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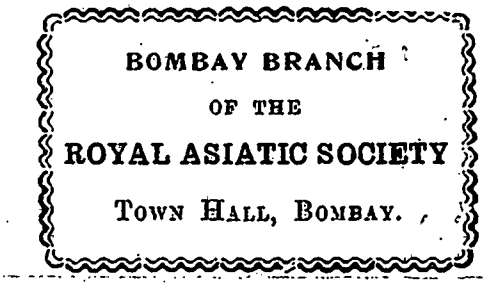
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The Honorable

SIR Wm BLACKSTONE, Kt.

One of the Justices

of the Court of Common Pleas

T. Gainsborough pinx. *E. Phillips sculpt.*

COMMENTARIES

ON

The Laws of England:

IN FOUR BOOKS;

WITH

AN ANALYSIS OF THE WORK.

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BY

SIR WILLIAM BLACKSTONE, KNT.

ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS.

The Twenty-first Edition.

WITH THE LAST CORRECTIONS OF THE AUTHOR, AND NOTES.

VOL. I.

By JOHN F. HARGRAVE, Esq., M.A.,

OF LINCOLN'S INN, BARRISTER AT LAW.

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TO

THE QUEEN'S MOST EXCELLENT MAJESTY,

THE FOLLOWING VIEW

OF THE LAWS AND CONSTITUTION

OF ENGLAND,

THE IMPROVEMENT AND PROTECTION OF WHICH

HAVE DISTINGUISHED THE REIGN

OF HER MAJESTY'S ROYAL CONSORT,

IS,

WITH ALL GRATITUDE AND HUMILITY,

MOST RESPECTFULLY INSCRIBED

BY HER DUTIFUL

AND MOST OBEDIENT

SERVANT,

WILLIAM BLACKSTONE.

PREFACE

TO THE TWENTY-FIRST EDITION.

THE life of the Author, (which, though prefixed to the *first*, was prepared by the Editor of the *second*, volume), has been principally extracted from the Memoir prefixed to Sir William Blackstone's Reports, and written by his executor and relative, Mr. James Clitherow. The Analysis at the beginning of each volume has been taken from the Author's Law Tracts, published in 1771. The entire text of the work has been rendered as pure and correct as possible by being collated with that of the edition of 1783, which was prepared by Dr. Burn from the copy containing the Author's last corrections. The Author's notes, also, have been carefully verified in every possible instance.

The Editors have in their notes endeavoured:—in the first place, to correct the few original oversights of the Author;—in the next place, to state the alterations in the law since the time of Blackstone, so far as they affect the text;—and lastly, to expand such passages as did not seem sufficiently full, and to explain such as did not seem sufficiently clear, for an elementary work. Some few notes have also been inserted, which in strictness cannot be included in any of the above classes, but such notes relate only to topics which have been much canvassed since the time of Blackstone, and are not of a technical nature; it being conceived that Mr. Chitty's attempt to expand "the Commentaries" into "a work of practical utility, and convenient reference to the profession in their daily avocations," is inconsistent, no less with the nature of the original work, than with the editorial character. Such of that gentleman's notes, however, as were thought valuable have been retained in this Edition.

With respect to the *first* volume, the deep and varied researches into our national and constitutional history, which have

taken place since the time of Blackstone, and the vast and valuable additions which have been made to our information, upon the topics embraced in that volume, demanded at the hands of an Editor, not only study and preparation for the task, of a more extensive and general, and less of a professional, character, than were required for the other volumes, but (especially upon the political topics) peculiar delicacy and caution in its execution. Moreover, the number and variety of the subjects commented upon in the first book, and the extent of the statutory alterations effected in the law relating thereto, required the severest retrenchment of all superfluous matter, in order to bring the notes within reasonable compass; while, on the other hand, the universal interest of that book to us all, affecting, as it does, every natural and political person, and every public and private relationship of social life, gave to this volume more of a popular character, and, therefore, rendered too great conciseness in the notes both undesirable and dangerous. These, and many other peculiarities, materially added to the difficulty and responsibility of this part of the undertaking; and now that the Editor submits his labours to the tribunal of the public, it would, indeed, be strangely presumptuous for him, with any due consideration of his own abilities and opportunities, to expect that his labours will not be peculiarly vulnerable to criticism. Nevertheless, he has at least the consolation of reflecting, that, when he commenced his labours, he placed before himself no mean standard of excellence,—that throughout the work he has devoted his best faculties to its execution,—and that, although to reach the standard to which he aspired be beyond his power, yet the peculiar difficulties of his undertaking entitle him to expect peculiar indulgence.

JOHN F. HARGRAVE.

Lincoln's Inn,
April, 1844.

SIR WILLIAM BLACKSTONE'S

PREFACE.

THE following sheets contain the substance of a course of lectures on the Laws of England, which were read by the Author in the University of OXFORD. His original plan took its rise in the year 1753; and notwithstanding the novelty of such an attempt in this age and country, and the prejudices usually conceived against any innovations in the established mode of education, he had the satisfaction to find, and he acknowledges it with a mixture of pride and gratitude, that his endeavours were encouraged and patronised by those, both in the university and out of it, whose good opinion and esteem he was principally desirous to obtain.

The death of Mr. VINER in 1756, and his ample benefaction to the university for promoting the study of the law, produced about two years afterwards a regular and public establishment of what the Author had privately undertaken. The knowledge of our laws and constitution was adopted as a liberal science by general academical authority: competent endowments were decreed for the support of a lecturer, and the perpetual encouragement of students; and the compiler of the ensuing Commentaries had the honour to be elected the first Vinerian professor.

In this situation he was led, both by duty and inclination, to investigate the elements of the law, and the grounds of our civil polity, with greater assiduity and attention than many have thought it necessary to do. And yet all, who of late years have attended the public administration of justice, must be sensible that a masterly acquaintance with the general spirit of laws and principles of universal jurisprudence, combined with an accurate knowledge of our own municipal constitutions, their original

reason, and history, hath given a beauty and energy to many modern judicial decisions, with which our ancestors were wholly unacquainted. If, in the pursuit of these inquiries, the author hath been able to rectify any errors which either himself or others may have heretofore imbibed, his pains will be sufficiently answered: and if in some points he is still mistaken, the candid and judicious reader will make due allowances for the difficulties of a search so new, so extensive, and so laborious.

Nov. 2, 1765.

POSTSCRIPT.

NOTWITHSTANDING the diffidence expressed in the foregoing Preface, no sooner was the work completed, but many of its positions were vehemently attacked by zealots of all (even opposite) denominations, religious as well as civil; by some with a greater, by others with a less degree of acrimony. To such of these animadverters as have fallen within the Author's notice, (for he doubts not but some have escaped it), he owes at least this obligation: that they have occasioned him from time to time to revise his work, in respect to the particulars objected to; to retract or expunge from it what appeared to be really erroneous; to amend or supply it when inaccurate or defective: to illustrate and explain it when obscure. But, where he thought the objections ill-founded, he hath left and shall leave the book to defend itself: being fully of opinion, that if his principles be false and his doctrines unwarrantable, no apology from himself can make them right; if founded in truth and rectitude, no censure from others can make them wrong.

LIFE OF THE AUTHOR.

SIR WILLIAM BLACKSTONE was born on the 10th July, 1723, in Cheapside, in the parish of St. Michael le Querne, some months after the death of his father, Mr. Charles Blackstone, a silkman, and citizen and bowyer of London, who was the third son of Mr. John Blackstone, a respectable apothecary in Newgate-street, descended from a family of that name in the West of England, at or near Salisbury. William's mother was Mary, eldest daughter of Lovelace Bigg, Esquire, of Chilton Foliot, in Wiltshire; she died before he attained his twelfth year.

William had three brothers, Charles, John, who died in infancy, and Henry. Charles and Henry were educated at Winchester, under the care of their uncle Dr. Bigg, who was warden of that society, and were afterwards both fellows of New College, Oxford; Charles became a fellow of Winchester, and vicar of Wimering in Hampshire: Henry, after having practised physic some years, went into holy orders, and died in 1778, vicar of Adderbury in Oxfordshire, a living in the gift of New College.

The early loss of both parents was probably the occasion of his future advancement, and that high literary character and reputation in his profession, which he has left behind him. For, had his father lived, it is likely, that the third son of a London tradesman, not of great affluence, would have been bred in the same line of life, and those parts, which have so much signalized the possessor of them, would have been lost in a warehouse or behind a counter. But, even from his birth, the care both of his education and fortune was kindly undertaken by his maternal

uncle, Mr. Thomas Bigg, who was then an eminent surgeon in London, and afterwards, on the death of his elder brothers, became owner of the Chilton estate, which is still enjoyed by that family.

In 1730, William, then about seven years old, was put to school at the Charter-House; and in 1735 was, by the nomination of Sir Robert Walpole, on the recommendation of Charles Wither, of Hall, in Hampshire, his cousin by the mother's side, admitted upon the foundation there. Here his talents and industry procured him the favour of his masters, who encouraged and assisted him with the utmost attention. At the age of fifteen he had reached the head of the school, and was thought well qualified to be removed to the University; and he was accordingly entered a commoner at Pembroke College in Oxford, on the 30th of November, 1736, and was the next day matriculated. At the same time he was elected to one of the Charter-House exhibitions by the Governors of that foundation, to commence from the Michaelmas preceding, but was permitted to continue a scholar there till after the twelfth of December, being the anniversary commemoration of the founder, to give him an opportunity of speaking the customary oration, which he had prepared, and which did him much credit.

About this time he obtained Mr. Benson's gold prize medal of Milton, for verses on that poet. And so well pleased was the Society of Pembroke College with their young pupil, that in the February following, they unanimously elected him to one of Lady Holford's exhibitions for Charter-House scholars in that house.

Here he prosecuted his studies with unremitting ardour; and although the classics, and particularly the Greek and Roman poets, were his favourites, they did not entirely engross his attention: logic, mathematics, and such other sciences as then formed part of a University education were not neglected; in the mathematics, he obtained what was then esteemed a tolerable proficiency and amused himself with pursuing the branch of it which relates to architecture. Of this science he made himself so far master, that, at the age of twenty, he compiled for his own use, and without any view to publication, a treatise intituled *Elements of Architecture*, which still exists in manuscript, and has been well spoken of by professional judges, who have remarked that the author pays particular attention to those practical branches of the subject which are usually neglected by amateurs, such as the

choice of soil, the making of foundations, the principles of construction, &c.

Having determined on his future plan of life, and made choice of the law for his profession, he was entered of the Middle Temple on the 20th of November, 1741. He now found it necessary to quit the more amusing pursuits of his youth for severer studies, and began seriously reading law. How disagreeably a change like this was felt by a young man whose parts and elegant tastes and accomplishments had already procured him some distinction, and whose taste was formed in accordance with, and admiration of, the classical and poetical beauties he had stored in his memory, he expressed in the following lines, some time afterwards published in the 4th volume of Dodsley's Miscellanies, under the title of *The Lawyer's Farewell to his Muse.*

" As by some tyrant's stern command,
A wretch forsakes his native land,
In foreign climes condemn'd to roam,
An endless exile from his home;
Pensive he treads the destined way,
And dreads to go, nor dares to stay;
Till on some neighbouring mountain's brow
He stops, and turns his eyes below;
There, melting at the well-known view,
Drops a last tear, and bids adieu:
So I, thus doom'd from thee to part,
Gay queen of fancy and of art,
Reluctant move with doubtful mind,
Oft stop, and often look behind.

" Companion of my tender age,
Serenely gay, and sweetly sage,
How blithsome were we wont to rove
By verdant hill, or shady grove,
Where fervent bees with humming voice
Around the honey'd oak rejoice,
And aged elms, with awful bend,
In long cathedral walks extend.
Lull'd by the lapse of gliding floods,
Cheer'd by the warbling of the woods,
How blest my days, my thoughts how free,
In sweet society with thee!
Then all was joyous, all was young,
And years unheeded roll'd along:
But now the pleasing dream is o'er,—
These scenes must charm me now no more;
Lost to the field, and torn from you,
Farewell!—a long, and last adieu!

" The wrangling courts, and stubborn law,
To smoke, and crowds, and cities draw;
There selfish Faction rules the day,
And Pride and Avarice throng the way;
Diseases taint the murky air,
And midnight conflagrations glare;
Loose Revelry and Riot bold,
In frighted streets their orgies hold;
Or when in silence all is drown'd,
Fell murder walks her lonely round;
No room for peace, no room for you—
Adieu, celestial Nymph, adieu!

" Shakespeare no more, thy sylvan son,
Nor all the art of Addison,
Pope's heaven-strung lyre, nor Waller's ease,
Nor Milton's mighty self must please:
Instead of these, a formal band
In furs and coifs around me stand,
With sounds uncouth, and accents dry,
That grate the soul of harmony.
Each pedant sage unlocks his store
Of mystic, dark, discordant lore;
And points with tottering hand the ways
That lead me to the thorny maze.

" There, in a winding, close retreat,
Is Justice doom'd to fix her seat;
There, fenced by bulwarks of the *law*,
She keeps the wondering world in awe;
And there, from vulgar sight retired,
Like eastern queens, is much admired.

" Oh! let me pierce the secret shade,
Where dwells the venerable maid!
There humbly mark, with reverent awe,
The guardian of Britannia's law;
Unfold with joy her sacred page
(The united boast of many an age,
Where mix'd though uniform appears
The wisdom of a thousand years),
In that pure spring the bottom view,
Clear, deep, and regularly true,
And other doctrines thence imbibe,
Than lurk within the sordid scribe;
Observe how parts with parts unite
In one harmonious rule of right;
See countless wheels distinctly tend,
By various laws, to one great end;
While mighty Alfred's piercing soul
Pervades and regulates the whole.

" Then welcome business, welcome strife,
Welcome the cares, the thorns of life,
The visage wan, the pore-blind sight,
The toil by day, the lamp by night,
The tedious forms, the solemn prate,
The pert dispute, the dull debate,
The drowsy bench, the babbling hall,
For thee, fair *Justice*, welcome all!

" Thus, though my noon of life be past,
Yet let my setting sun at last
Find out the still, the rural cell
Where sage Retirement loves to dwell!
There let me taste the home-felt bliss
Of innocence and inward peace;
Untainted by the guilty bribe,
Uncursed amid the happy tribe;
No orphan's cry to wound my ear,
My honour and my conscience clear;
Thus may I calmly meet my end,
Thus to the grave in peace descend!"

Several little fugitive pieces besides this have at times been communicated by him to his friends, and he left (not with a view of publication) a small collection of juvenile pieces, both originals and translations, inscribed with this line from Horace,

" Nec lusisse pudet, sed non incidere ludum."

His investigation of the quarrel between Pope and Addison, communicated to Dr. Kippis and anonymously printed by him in the *Biographia Brittanica*, and some notes on Shakespeare, which, just before his death, he communicated to Mr. Malone, and which that gentleman inserted in his last edition of that author, show with how little of rigour he adhered to his ascetic resolutions*. Mr. D'Israeli (whose good-natured criticisms are,

* The verses, published in the name of J. Clitherow, (the editor of Sir W. B.'s Reports), in the Oxford Collection, on the death of the Prince of Wales, in 1751, and which were esteemed one of the best compositions in that collection, were written by Mr. Blackstone, who at that time exacted a promise of secrecy: which promise Mr. Clitherow considered himself absolved from by the death of the learned judge, and felt a sensible satisfaction in restoring to the right owner that applause he had so long received without any pretensions: and in making this acknowledgment, Mr. Clitherow also, in a note in his edition of Sir W. B.'s Reports, expressed a hope that it might atone for his having so long permitted it to have remained generally unknown, particularly as, on those occasions, it was by no means unusual, or reckoned a discredit to a young man, to have his name prefixed to the production of another person. If the poem is to be judged according to the

however, as little to be relied upon as those of Sir Walter Scott) speaks in high terms of the former disquisition : he says, " His happy genius has only honoured literary history by the masterly, free, and luminous arrangement of investigation, to which, since the time of Boyle, it has been too great a stranger."

In November, 1743, he was elected into the Society of All Souls College ; and, in the November following, he spoke the Anniversary Speech in commemoration of Archbishop Chichele, the founder, and the other benefactors to that house of learning, and was admitted actual fellow.

From this period he divided his time between the University and the Temple, where he took chambers, in order to attend the Courts. In the former he pursued his academical studies, and on the 12th of June, 1745, commenced Bachelor of Civil Law; in the latter he applied himself closely to his profession, both in the Hall and in his private studies, and, on the 28th of November, 1746, was called to the Bar.

In the early part of his professional life, upon a vacancy of the Civil Law Professorship in the University of Oxford, Mr. Murray (afterwards Earl Mansfield) took occasion to expostulate with

taste of the present day, Mr. Clitherow was certainly imposed upon when he allowed it to be printed in his name. The opening stanzas may be taken as a fair specimen of what was thought good writing in 1751 :—

" 'Twas on the evening of that gloomy day,
When Frederic, ever lov'd and ever mourn'd,
(Such Heaven's high will, and who shall disobey?)
To Earth's cold womb in holy pomp return'd.

" With sullen sound, the death-denouncing bell
Proclaim'd aloud the dismal tale of woe,
The pealing organ join'd the solemn knell
In mournful notes majestically slow.

" The full-voic'd choir, in robes of purest white,
With frequent pause the soul-felt anthem raise,
While o'er the walls in darkest sable dight,
A thousand tapers pour'd their holy blaze.

* * * *

" Who shall to arts their pristine honour bring?
Rear from the dust fair Learning's laurel'd head?
Or bid rich Commerce plume her daring wing?
Arts, learning, commerce, are in Frederic dead."

* * * *

the Duke of Newcastle, then Chancellor of the University of Cambridge, on the appointment of a successor, and lamented that at Oxford the civil law lectures and the opportunities of gaining legal knowledge through that channel were, when contrasted with the sister University, in the most degraded and unworthy situation, and expressed a wish that an able professor might be invited to fill the vacant seat. Though Dr. Jenner was the person thought of by the Duke, yet he asked Mr. Murray if he could recommend him a gentleman who would fill it with greater ability. Mr. Murray shortly afterwards introduced and warmly recommended Mr. Blackstone to the Duke of Newcastle; who in order to ascertain the political bias of the new candidate, addressed him thus: "Sir, I can rely upon the judgment of your friend Mr. Murray, as to your giving law lectures in a style most beneficial to the students; and I dare say, I may safely rely on you, whenever any thing in the political hemisphere is agitated in the University, that you will exert yourself in *our* behalf." The answer was, "Your Grace may be assured, that I will discharge my duty in giving law lectures to the best of my poor ability."—"Ay, ay," replied his Grace, "and your duty in the other branch too?"—Mr. Blackstone only bowed assent, and a few days afterwards Dr. Jenner was appointed the civil law professor.

The first years of his attendance on the Courts appear to have been more than usually unproductive; not possessing either a graceful delivery or a flow of elocution, nor having any powerful friends or connexions to recommend him, he made his way very slowly, attracting little notice and less practice; and the effect upon his hopes of this ill success may be traced in his notes of cases in the King's Bench, which he commenced at the period of his call, and, after a few years of diligence, gradually neglected.

At Oxford, his active and practical mind had more room to display itself, and, being elected into the office of Bursar soon after he had taken his degree, and finding the muniments of the College in a confused state, he undertook a thorough search, and completed a new arrangement, from whence that Society reaped great advantage. He found, also, the method of keeping accounts, in use among the older Colleges, though very exact, yet tedious and complex; he, therefore, drew up a dissertation on the subject, in which he entered minutely into the theory, and elucidated every intricacy that might occur. A copy of this tract is still preserved for the benefit of his successors in the Bursarship.

But it was not merely the estates, muniments, and accounts of the College, in which he was so usefully employed during his residence in that Society. The Codrington Library had for many years remained an unfinished building. He hastened its completion, rectified several mistakes in the architecture, and formed a new arrangement of the books under their respective classes. The Duke of Wharton, who had engaged himself by bond to defray the expense of building the apartments between the Library and Common Room, being obliged soon after to leave his country, and dying in very distressed circumstances, the discharge of this obligation was long despaired of. It happened, however, in a course of years, that his Grace's executors were enabled to pay his debts, and by the activity of Mr. Blackstone, the building was completed, and the College enabled to recover the whole benefaction.

In May, 1749, as a small reward for his services, and to give him further opportunities of advancing the interests of the College, he was appointed Steward of their Manors. And, in the same year, on the resignation of his uncle, Seymour Richmond, Esq., he was elected Recorder of the borough of Wallingford, in Berkshire, and received the King's approbation on the 30th of May.

The 26th of April, 1750, he commenced Doctor of Civil Law, and thereby became a member of the Convocation, which enabled him to extend his views, beyond the circle of his own society, to the general benefit of the University at large.

In the same year he published *An Essay on Collateral Consanguinity*, relative to the claim made by those who, by a pedigree, proved themselves of kin to the founder of All Souls College, of being elected, in preference to all others, into that society. Those claims became now so numerous, that the college, with reason, complained of being frequently precluded from making choice of the most ingenious and deserving candidates. In this treatise, (his first publication), he endeavoured to prove, that, as the kindred to the founder, a popish ecclesiastic, could not but be collateral, the length of time elapsed since his death must, according to the rules both of the civil and canon law, have extinguished consanguinity; or that the whole race of mankind were equally the founder's kinsmen. This work, although it did not answer the end proposed, or convince the then Visitor, did the author great credit, and shewed he had read much, and well

digested what he had read. And, most probably, the arguments contained in it had some weight with his Grace who succeeded to the see of Canterbury, and who, a few years afterwards, on application to him as Visitor of the College, formed a new regulation, which gave great satisfaction, limiting the number of founder's kin, whereby the inconvenience complained of was in a great measure removed, without altogether annihilating claims founded on the express words of the college statutes. In forming this new regulation, his Grace made choice of Mr. Justice Blackstone, as his common law assessor, together with that eminent civilian, Dr. Hay, well knowing how much he was master of the subject then under consideration.

Having attended the Courts at Westminster for seven years, and finding the profits of his profession very inadequate to the expense, in the summer of the year 1753, he determined to retire to his fellowship and an academical life, continuing the practice of his profession, as a provincial counsel. He had previously planned his Lectures on the Laws of England, and in the ensuing Michaelmas Term he entered on his new province of reading those Lectures; which, even at their commencement, such were the expectations formed from the acknowledged abilities of the lecturer, were attended by a very crowded class of young men of the first families, characters, and hopes.

In July, 1755, he was appointed one of the Delegates of the Clarendon Press. Upon his entering on the duties of this office, he discovered many abuses, which required correction; much mis-management, which demanded new and important regulations. In order to obtain a thorough insight into the nature of both, he made himself master of the mechanical part of printing; and to promote and to complete a reform, he printed a letter on the subject, addressed to Dr. Randolph, at that time Vice-Chancellor. This and his other endeavours produced the desired effect, and he had the pleasure of seeing, within the course of a year, the reform he had proposed carried into execution, much to the honour as well as the emolument of the University, and the satisfaction of all its friends. While engaged in these pursuits, he drew up a small tract relative to the management of the University Press. This he left for the use of his successors in that office; and it was held in high esteem, and regarded by them as the ground-work, not only of the improvements then made, but of those also which were in contemplation.

About a year before this he published *An Analysis of the Laws of England*, as a guide to those who attended his lectures. The principle of this arrangement, which he afterwards adopted in the Commentaries, was borrowed from Sir Matthew Hale, with some alterations which were not improvements. To scientific precision it has no pretensions; but it is simple, intelligible, and sufficiently convenient.

On the death of Dr. Coxed, Warden of Winchester, in the year 1757, he was elected, by the surviving visitors of Michel's new foundation in Queen's College, into that body. This situation afforded fresh matter for his active genius to exercise itself upon; and it was chiefly by his means, that this donation, which had been for some years subject of contention only, became a very valuable acquisition to the College, as well as an ornament to the University, by completing that handsome pile of building towards the High-street, which, for many years, had been little better than a confused heap of ruins. The engrafting a new set of fellows and scholars into an old established society, was not an easy task, and here the difficulty had increased, from the many unsuccessful attempts previously made, all of which had terminated in disputes between the members of the old, and the visitors of the new foundation. Dr. Blackstone, however, was not disheartened, but pursued his plan for the improvement of Mr. Michel's original donation, without departing from his intention; to the entire satisfaction of the members of the old foundation; which, together with a body of statutes he drew for the purpose, was confirmed by act of Parliament, in the year 1769.

Being engaged as counsel in the great contest for knights of the shire for the county of Oxford, in 1764, he very maturely considered a question then much agitated, Whether copyholders of a certain nature had a right to vote in county elections: and having committed his thoughts to paper, in the shape of a small treatise, he was prevailed upon, by Sir Charles Mordaunt, and other members of Parliament, who had brought in a bill to settle that controverted point, to publish it in March, 1758, under the title of *Considerations on Copyholders*. The bill soon after passed into a law.

Mr. Viner having by his will left the copyright of his *Abridgment*, together with other property to a considerable amount, to the University of Oxford, to found a professorship, fellowships, and scholarships of common law, Dr. Blackstone was, on the

20th of October, 1758, unanimously elected Vinerian Professor. This situation(he informs us in his introduction to the Commentaries) led him to investigate the elements of law, and the grounds of our civil polity, with greater assiduity and attention than many have thought it necessary to do; and, on the 25th of the same month, he read his first introductory lecture, so celebrated for the elegance of its composition, which, at the request of the Vice-Chancellor and Heads of Houses, he published, and afterwards prefixed to the first volume of his Commentaries.

His lectures were received with such universal approbation, that he was requested to read them to the Prince of Wales, (afterwards George the Third). Being at that time engaged to a numerous class of pupils in the University, he thought himself bound to decline the request. But he transmitted copies of many of them for the perusal of his Royal Highness; who, far from being offended at an excuse grounded on so honourable a motive, sent him a handsome present as an acknowledgment of his merit.

In the course of this year he was strongly pressed by Lord Chief Justice Willes, and Mr. Justice (afterwards Earl) Bathurst, to accept the coif, which he declined. In the year 1759, he published two small pieces merely relative to the University: the one intituled *Reflections on the opinions of Messrs. Pratt, Morton, and Wilbraham, relating to Lord Litchfield's Disqualification,* who was then a candidate for the Chancellorship; the other, *A Case for the Opinion of Counsel on the Right of the University to make new Statutes.*

He had now acquired sufficient reputation and influence to hope for advancement in his profession from patronage, even if he should again fail of success as counsel, and with this expectation, in June, 1759, he bought chambers in the Temple, resigned the office of Assessor of the Vice-Chancellor's Court, which he had held for about six years, and, soon after, the Stewardship of All Souls College; and, in Michaelmas Term, resumed his attendance at Westminster; still continuing to pass some part of the year at Oxford, and to read his lectures there, at such times as did not interfere with the London Law Terms.

In November, 1759, he published a new edition of the Great Charter and Charter of the Forest; which added much to his former reputation, not only as a lawyer, but as an antiquarian and an able historian. The execution of the mechanical part of this edition, also, reflected great honour on the author, as the principal

reformer of the Clarendon press, from whence no work had before issued equal in beauty to this.

This publication drew him into a short controversy with the late Dr. Lyttleton, then Dean of Exeter, and afterwards Bishop of Carlisle.—The Dean, to assist Blackstone in his publication, had favoured him with the collation of a very curious antient Roll, containing both the Great Charter and that of the Forest, of the 9th of Henry the 3rd, which he and many of his friends judged to be an original. The editor of the Charters, however, thought otherwise, and excused himself (in a note in his Introduction) for having made no use of its various readings, "as the plan of his edition was confined to Charters which had passed the Great Seal, or else to authentic entries and enrolments of record, under neither of which classes the Roll in question could be ranked." The Dean, concerned for the credit of his Roll, presented to the Antiquarian Society a vindication of its authenticity, dated June 8th, 1761; and Blackstone delivered in an answer to the same learned body, dated May the 28th, 1762, alleging, as an excuse for the trouble he gave them, "that he should think himself wanting in that respect which he owed to the Society and Dr. Lyttelton, if he did not either own and correct his mistake, in the octavo edition then preparing for the press, or submit to the Society's judgment the reasons at large, upon which his suspicions were founded." These reasons, we may suppose, were convincing, for here the dispute ended*.

About the same time he published a small Treatise on *The Law of Descents in Fee Simple.*

Upon the dissolution of Parliament in 1761, he was returned burgess for Hindon, in Wiltshire; and, on the 6th of May following, a patent of precedence was granted him to rank as King's Counsel, he having, a few months before, declined the office of Chief Justice of the Court of Common Pleas, in Ireland.

* It may be here mentioned, that as an Antiquarian, and a member of this Society, into which he was admitted February the 5th, 1761, he wrote "A Letter to the Honourable Daines Barrington, describing an antique seal, with some observations on its original, and the two successive Controversies which the disuse of it afterwards occasioned."

This Seal, having the royal arms of England on it, was one of those which all persons having the exercise of ecclesiastical jurisdiction, were obliged by the statute of the 1 Edw. VI. ch. 2, to make use of. This letter is printed in the 3rd volume of the Archæologia; but his discussion of the merits of the Lyttleton Roll, though containing much good antiquarian criticism, has not yet been made public.

These marks of distinction, and the celebrity he had acquired as a writer, operating most favourably on his professional views by bringing him a considerable increase of practice, chiefly, it would seem, as a chamber counsel, on the 5th of May 1761, he married Sarah, the eldest surviving daughter of James Clitherow, of Boston House, in the county of Middlesex; with whom (says his biographer, Mr. Clitherow), he passed near nineteen years, in the enjoyment of the purest domestic and conjugal felicity, (for which no man was better calculated), and which, he used often to declare, was the happiest part of his life. By this lady he had nine children, the eldest and youngest of whom died infants; seven survived him, viz. Henry, James, William, Charles, Sarah, Mary, and Philippa; the eldest was not much above the age of sixteen at his death. James, who died in 1831, went through nearly the same course of University preferment as his father; he was fellow of All Souls, Principal of New Inn Hall, Vinerian Professor, Deputy High Steward, and Assessor in the Vice-Chancellor's Court.

Having by his marriage given up the fellowship at All Souls, he was, on the 28th of July, 1761, appointed Principal of New Inn Hall, by the Earl of Westmoreland, the then Chancellor of Oxford. This not only furnished him with an agreeable residence, during the periods of delivering these lectures, but conferred a rank in the University which greatly facilitated his labours in promoting whatever he conceived to be useful and beneficial to that learned body.

About this time an attempt being made to restrain the power given him, as Professor, by the Vinerian statutes, to nominate a deputy to read the solemn lectures, he published a state of the case, for the perusal of the Members of Convocation, upon which it was dropped. But in the year 1766, he resigned the Vinerian Professorship, finding he could not discharge the personal duties, consistently with his professional attendance in London.

In 1762, he collected and re-published several of his pieces under the title of *Law Tracts*, in two volumes, octavo.

In 1763, on the establishment of the Queen's family, he was appointed Solicitor-General to her Majesty; and was chosen about the same time a Bencher of the Middle Temple.

Many imperfect and incorrect copies of his lectures being in circulation, and a pirated edition of them having been published, or prepared for publication, in Ireland, he was induced to print

a correct edition himself; and, in November, 1765, twelve years after the delivery of his original lectures, the first volume appeared, under the title of *Commentaries on the Laws of England;* and the other three volumes were published in the course of the four succeeding years.

In 1766, with the Vinerian Professorship, he resigned the Principality of New Inn Hall. When his views were first turned towards the Vinerian Professorship, he had formed a design of settling in Oxford for life: and flattered himself, that by annexing the office of Professor to the Principality of one of the Halls, (or perhaps converting it into a college), and placing Mr. Viner's fellows and scholars under their Professor, a society might be established for students of the common law, similar to that of Trinity-Hall in Cambridge, for civilians. This plan was much favoured by Mr. Viner's will, by which he left to the University "all his personal estate, books, &c., for the constituting, *establishing*, and endowing one or more Fellowship or Fellowships, and Scholarship or Scholarships, *in any College or Hall* in the said University, as to the Convocation shall be thought most proper for students of the Common Law." But, notwithstanding this plain direction to establish them in *some* College or Hall, the clause from the Delegates, which ratified this designation, was rejected by a negative in convocation. This unexpected, and, as was assumed by his friends, unmerited rejection, destroyed Blackstone's prospects of a lasting settlement at Oxford. His views of an established society for the study of the common law were at an end, and no scope left for the exercise of that ardour for improvement which (in the opinion of Mr. Clitherow) so strongly marked his character through life.

In 1768, he was returned to Parliament for the borough of Westbury, in Wiltshire, and took part in the debates relative to the election of Mr. John Wilkes, when his adversaries in the house stated that many of the positions advanced by him on that occasion, were strongly opposed to the doctrines laid down in the Commentaries; and he was also attacked in a pamphlet supposed to have been written by Sir W. Meredith. To this pamphlet he published a reply, under the title of *A Letter to the Author of the Question Stated*, which was severely commented upon by Junius, who concluded his bitter criticism thus: —"If I were personally your enemy, I should dwell with a malignant pleasure upon those great and useful qualities you

certainly possess, and by which you once acquired, though they could not preserve to you, the respect and esteem of your country. I should enumerate the honours you have lost, and the virtues you have disgraced; but having no private resentments to gratify, I think it sufficient to have given my opinion of your public conduct, leaving the punishment it deserves to the closet and to yourself."

In the same year, Dr. Priestley animadverted on some positions in the Commentaries, relative to offences against the doctrine of the Established Church, and Dr. Furneaux, with less ability, addressed to him some letters on his exposition of the Toleration Act. He published an answer to Dr. Priestley, and, in subsequent editions, modified some of the most glaring of the errors into which his political bias had led him. The attacks of Bentham and Sheridan were founded on principles too widely different from his own, and of too general application, to be thus acknowledged.

The reputation of Blackstone as an able lawyer was now so thoroughly established, that, had he been gifted with fluency of speech, and readiness and hardiness in political discussion, and had he possessed a constitution equal to the fatigues attending the most extensive business of the profession, he might probably have obtained its most lucrative emoluments and highest offices. The offer of the Solicitor-Generalship, on the resignation of Dunning in January, 1770, opened the most flattering prospects to his view. But his recent experience in the House of Commons, his consciousness of unfitness for active political partizanship, and a desire for more easy honours and emoluments, were probably his inducements to decline an appointment which was afterwards more appropriately bestowed upon Thurlow.

He, however, readily accepted the office of Judge of the Common Pleas, on the resignation of Mr. Justice Clive, and kissed his Majesty's hand on that appointment, February 9th, 1770; on the 12th of the same month, he was called to the degree of a Serjeant at Law, and chose for a motto on the rings distributed on that occasion, "*Secundis dubiisque rectus.*" But previously to the passing of his patent, Mr. Justice Yates having expressed an earnest wish to retire from the King's Bench into the Court of Common Pleas, (which, even at that time was looked upon as a *retreat* from active life,) Blackstone, from motives of personal esteem, consented. On the 16th February, he kissed his Majesty's

hand on being appointed a Judge of the Court of King's Bench, and also received the honour of knighthood. But, upon the death of Mr. Justice Yates, which happened on the 7th of June following, he was gratified by being re-appointed to his seat in the Court of Common Pleas. He was succeeded in the King's Bench by Sir W. H. Ashhurst. On his promotion to the Bench he resigned the Recordership of Wallingford.

He seemed now arrived at the point he always wished for, and might justly be said to enjoy *otium cum dignitate*. Freed from the attendance at the Bar, and what he had still a greater aversion to, in the Senate, "where," to use his own expression, (in his reply to Dr. Priestley's Remarks,) "amid the rage of contending parties, a man of moderation must expect to meet with no quarter from any side," although he diligently and conscientiously performed the duties of the high office he was placed in, yet the leisure afforded by the legal vacations he dedicated to the private duties of this life, which, as the father of a numerous family, he found himself called upon to exercise; or to literary retirement, and the society of his friends, at his villa called Priory Place, in Wallingford, which he purchased soon after his marriage, having for some years before occasionally resided at it. His connection with this town, both from his office of Recorder, and his occasional residence there from about the year 1750, led him to promote every plan designed for its benefit or improvement. To his activity it is indebted for two new turnpike roads through the town, the one opening a communication, by means of a new bridge over the Thames at Shillingford, between Oxford and Reading, the other to Wantage, through the vale of Berkshire.* What substantial advantage the town of Wallingford derived from hence will be seen by the gradual increase of its malt trade between the years 1749 and 1779, extracted from the entries of the Excise-Office during that period.†

* He was ever a great promoter of the improvement of public roads. The new western road from Oxford over Botely Causeway was projected, and the plan of it chiefly conducted by him. He was the more earnest in this design, not merely as a work of general utility and ornament, but as a solid improvement to the estate of a nobleman, in settling whose affairs he had been most laboriously and beneficially employed.

† An average account of the number of net bushels of malt made in Wallingford, from Midsummer 1749 to Midsummer 1779, inclusive:

Aver. of 5 yrs. ending Mid.	1754	49,172
Do. . of do. . . .	1759	58,676
Do. . of do. . . .	1764	97,370
Do. . of do. . . .	1769	101,086
Do. . of do. . . .	1774	113,135
Do. . of do. . . .	1779	107,254

To his architectural talents, his liberality, his zeal, and his numerous friends, Wallingford likewise owes the rebuilding that handsome fabric, St. Peter's Church.

These were his employments in retirement. In London his active mind was never idle, and when unoccupied by the duties of his station, he was generally engaged in some scheme of public utility. In the latter part of his life he devoted much time to the consideration of prison discipline. He had remarked the inefficacy of the system which restores prisoners to society, on the expiration of their punishment, more complete adepts in criminal practices than when they entered the gates of their gaol. Idleness, drunkenness, and an unrestrained communication between the oldest and youngest culprits were the characteristics of almost every gaol in England.* Amongst others he exerted himself, in conjunction with Mr. Howard, to procure an act of Parliament for the establishment of penitentiary houses near the metropolis, the objects of which should be "to seclude the criminals from their former associates, to separate those of whom hopes might be entertained from those who were desperate; to teach them useful trades; to accustom them to habits of industry; to give them religious instruction, and to provide them with a recommendation to the world and the means of obtaining an honest livelihood, after the expiration of the term of their imprisonment." The statute of the 19th Geo. III. c. 74, was accordingly passed, and though it did not produce all the beneficial effects that were expected from it, it led the way to more just and rational views of prison discipline. In one of his charges to a grand jury, he referred to the establishment of penitentiaries under this act in the following terms:—"In these houses the convicts are to be separately confined during the intervals of their labours, debarred from all incentives to debauchery, instructed in religion and morality, and forced to work for the benefit of the public. Imagination cannot figure to itself a species of punishment in which terror, benevolence, and reformation are more happily blended together. What can be more dreadful to the riotous, the libertine, the voluptuous, the idle delinquent, than solitude, confinement, sobriety, and constant labour. Yet what can be more truly beneficial? Solitude will awaken reflection; confinement will banish temptation; sobriety will restore vigour; and labour will beget a habit of honest industry; while the aid of a religious instructor may

implant new principles in his heart; and when the date of his punishment is expired, will conduce both to his temporal and eternal welfare. Such a prospect as this is surely well worth the trouble of an experiment."

The augmentation of the Judges' salaries, calculated to make up the deficiencies occasioned by the heavy taxes they are subject to, and thereby to render them more independent, was obtained in a great measure by his industry and attention.

Sir William did not live to enjoy, for a lengthened period, the honours to which his learning, his literature, and his diligence had raised him. His constitution, hurt by the studious labours of his younger days and by an unhappy aversion to exercise, grew daily worse: not only the gout, with which he was frequently, though not very severely, visited from the year 1759, but a nervous disorder also, that frequently brought on giddiness, added to a corpulency of body, rendered him still more inactive than he used to be, and contributed to the breaking up of his constitution at an early period of life.

About Christmas, 1779, he was seized with a violent shortness of breath, which his physicians supposed to arise from a dropsical habit, and water on the chest; and by the application of the usual remedies, he received relief. On coming to London to attend Hilary Term, he was again attacked, chiefly in his head, which brought on a drowsiness and stupor, that baffled all the art of medicine; the disorder increased rapidly, he lay some days insensible, and on the 14th of February, 1780, expired in the 57th year of his age. He was buried by his own direction in a vault he had built for his family in the parish church of St. Peter's in Wallingford. His neighbour and friend Dr. Barrington, Bishop of Llandaff, at his own request, performed the funeral service.

The fame of Sir William Blackstone as a commentator on the laws of England has rendered his character as a judge less conspicuous. His judgments are indeed never wanting in learning and good sense; but they would not alone have raised his name to its present distinguished station.

In his views of politics, as of law, he was inclined rather to extenuate and justify than to criticise or amend; or, as his character is otherwise expressed by his biographer, Mr. Clitherow, "As a Senator, he was averse to party violence, and moderate in his sentiments. In Parliament, he was a firm supporter of the true

principles of our happy Constitution, in Church and State; on the real merits of which few men were better qualified to decide. He was an active and judicious promoter of whatever he thought useful or advantageous to the public in general, or to any particular society or neighbourhood he was connected with; possessing a sound judgment, with a clear and analytical head, and an unremitting perseverance in pursuing whatever he thought right, he was enabled to carry many beneficial plans into execution."

"Being a believer in the great truths of Christianity, from a thorough investigation of its evidences, and attached to the Church of England from conviction of its excellence, his principles were those of its genuine members—enlarged and tolerant. His religion was pure and unaffected, his attendance on its public duties regular, and performed with seriousness and devotion."

"He was an excellent manager of his time, and though much of it was spent in the study of books, and the employment of his pen, it was done without the parade or ostentation of being a hard student. It was observed that during his residence at college, his studies never appeared to break in upon the common business of life, or the innocent amusements of society; for the latter of which few men were better qualified, being possessed of the happy faculty of making his own company agreeable and instructive, whilst he enjoyed, without reserve, the society of others."

"Melancthon himself could not have been more rigid in observing the hour and minute of an appointment; during the years in which he read his lectures at Oxford, it could not be remembered, that he had ever kept his audience waiting for him, even a few minutes. As he valued his own time, he was extremely careful not to be instrumental in squandering or trifling away that of others, who, he hoped, might have as much regard for theirs, as he had for his. Indeed, punctuality was in his opinion so much a virtue, that he could not bring himself to think perfectly well of any who were notoriously defective in it."

"The virtues of his private character, less conspicuous in their nature, and consequently less generally known, endeared him to those he was more intimately connected with, and who saw him in the more retired scenes of life. He was, notwithstanding his contracted brow (partly owing to his being very near-sighted), a cheerful, agreeable, and facetious companion. He was a faithful friend; an affectionate husband and parent; and a charitable benefactor to the poor: possessed of generosity, without affectation,

bounded by prudence and economy. The constant accurate knowledge he had of his income and expenses (the consequence of uncommon regularity in his accounts) enabled him to avoid the opposite extremes of meanness and profusion."

"Strict in the exercise of every public and private duty himself, he expected the same attention to both in others; and, when disappointed in this expectation, was apt to animadvert with some degree of severity, on those who, in his estimate of duty, seemed to deserve it. This rigid sense of obligation, added to a certain irritability of temper, derived from nature, and increased in his latter years by a strong nervous affection, together with his countenance and figure, conveyed an idea of sternness, which occasioned the heavy, but unmerited, imputation, among those who did not know him, of ill-nature; but he had a heart kind and benevolent as ever man possessed."

"A natural reserve and diffidence, which accompanied him from his earliest youth, and which he could never shake off, appeared to a casual observer like pride; especially after he became a Judge, when he thought it his duty to keep strictly up to forms (which, as he was wont to observe, are frequently too much laid aside), and not to lessen the respect due to the dignity and gravity of his office, by any outward levity of behaviour*."

The reception of the Commentaries was of the most flattering description. Previously to their publication the volumes usually put into the hands of the student at the commencement of his studies were Finch's Common Law or Wood's Institutes—works ill adapted to reconcile the student to the profession he was about to enter; and which were readily laid aside for a manual, in which accurate learning, systematic arrangement, and comprehensive research were accompanied by an elegance of style to which hitherto the compositions of our English jurists had been

* The author of The Biographical History of Sir Wm. Blackstone relates the following anecdote of him:—"I was perfectly well acquainted with a certain bookseller, who told me, that upon hearing Mr. Blackstone had commenced Doctor of Civil Law, the next time he did him the honour of a visit, he (the bookseller) in the course of conversation, and out of pure respect, called the new made Civilian 'DOCTOR.' This *familiar* manner of accosting him (as he was pleased to term it) put him in such a passion, and had such an instantaneous and violent effect, and operated on him to so alarming a degree, that the poor bookseller thought he should have been obliged to send for a doctor from St. Luke's."

strangers. Lord Mansfield, with whom the elder writers of our law appear never to have been favourites, expressed in strong terms his admiration of the manner in which Mr. Blackstone had executed his task. Having been requested to point out the books proper for the perusal of a student, he is said to have replied, "Till of late I could never, with any satisfaction to myself, answer that question; but since the publication of Mr. Blackstone's Commentaries, I can never be at a loss. There your son will find analytical reasoning diffused in a pleasing and perspicuous style. There he may imbibe imperceptibly the first principles on which our excellent laws are founded; and there he may become acquainted with an uncouth crabbed author, Coke upon Littleton, who has disappointed and disheartened many a tyro, but who cannot fail to please in a modern dress."*

In preparing his Commentaries for the press, he anxiously sought to render them as free from errors as possible. They were submitted to Lord Mansfield and to Chief Justice Wilmot†; but in what degree the work benefited by this revision we are uninformed.

Great, however, as the admiration was with which the Commentaries were received, their demerits, which, in one point of view, were neither few nor slight, did not escape, what they fully merited, great severity of criticism. His ill guarded expression, in his fourth volume, of his sentiments on religious toleration and the character of the dissenters, provoked some warm remarks from Dr. Priestley, to which Blackstone published a Reply, in which, through the verbal sophistries in which he took refuge, and the elegance and gentlemanly *retenuë* of his expressions, is easily perceived a consciousness that the castigation was not altogether unmerited, and no little irritation of temper at having received it. Dr. Furneaux addressed several long letters to him on the same subject. Sheridan and Bentham attacked some of his political chapters. Their criticisms did not draw from him in his subsequent editions, either a bold defence, or a magnanimous surrender of the dogmas to which he was attached; with one exception, his policy was to surround and qualify what had been the most unguarded of his expressions, with a variety of rhetorical expletives that left the meaning to common apprehensions just what it was, but, in case it should be called in question, would be

* Holliday's Life of Mansfield, p. 89. † Life of Wilmot, p. 202.

found, upon a critical examination, to have reduced it to nothing. "These attacks," says Bentham, "have been the means of his adding a good deal of this kind of rhetorical lumber to the plentiful stock there was of it before. One passage, indeed, a passage deep-tinctured with religious gall, they have been the means of clearing away entirely, and in this at least they have done good service. They have made him sophisticate,* they have made him even expunge, but all the Doctors in the world, I doubt, would not bring him to confession."

In the year 1776, Bentham published his *Fragment on Government, or a Comment on the Commentaries, being an examination of what is delivered on the Subject of Government in general, in the introduction to Sir W. Blackstone's Commentaries; with a Preface, in which is given a Critique on the Work at large.* In this earliest and most finished of his publications, Bentham has pointed out, with equal severity and justice, the peculiar faults and merits of the Commentator, in language as elegant as his own, but far more perspicuous and exact, and pointed and relieved with a wit to which vanity had not yet given unbridled license.

Bentham thus explains the nature of the provocation to his undertaking:—"If it be a matter of importance and of use to us to be made acquainted with distant countries, surely it is not a matter of much less importance, nor of much less use to us, to be made better and better acquainted with the chief means of living happily in our own: if it be of importance and of use to us to know the principles of the element we breathe, surely it is not of much less importance nor of much less use to comprehend the principles, and endeavour at the improvement of those laws, by which alone we breathe it in security. If to this endeavour we should fancy any author, especially any author of great name, to be, and as far as could in such case be expected, to avow himself

* In the first edition of the Commentaries, vol. 4, p. 50, the following passage occurred:—"First, of the offence of *reviling the ordinances* of the church. This is a *crime* of much *grosser* nature than that of *mere non-conformity*, since it carries with it the utmost indecency, arrogance, and ingratitude;—indecency, by setting up private judgment in [virulent and factious] opposition to public [authority]; arrogance, by treating with contempt and rudeness, what has, at least, a better chance to be right than the singular notions of any particular man; and ingratitude, by denying that liberty of conscience to the members of the national church which the retainers to every petty conventicle enjoy." The words within crotchets were the result of Dr. Furneaux and Dr. Priestley's Letters.

a determined and persevering enemy, what should we say of him? We should say that the interests of reformation, and through them the welfare of mankind, were inseparably connected with the downfall of his works: of a great part, at least, of the esteem and influence which these works might under whatever title have acquired.

"Such an enemy has been my misfortune (and not mine only) to see, or fancy at least I saw, in the Author of the celebrated Commentaries on the Laws of England: an Author whose works have had beyond comparison a more extensive circulation, have obtained a greater share of esteem, of applause, and consequently of influence (and that by a title on many grounds so indisputable) than any other writer who on that subject has ever yet appeared.

"It is on this account that I conceived, some time since, the design of pointing out some of what appeared to me the capital blemishes of that work, particularly this grand and fundamental one, the antipathy to reformation; or rather, indeed, of laying open and exposing the universal inaccuracy and confusion which seemed to my apprehension to pervade the whole. For, indeed, such an ungenerous antipathy seemed of itself enough to promise a general vein of obscure and crooked reasoning, from whence no clear and sterling knowledge could be derived; so intimate is the connexion between some of the gifts of the understanding, and some of the affections of the heart.

"It is in this view then that I took in hand that part of the first volume to which the Author has given the name of Introduction."

* * * * *

"There are two characters, one or other of which every man who finds any thing to say on the subject of Law, may be said to take upon him;—that of the Expositor, and that of the Censor. To the province of the Expositor it belongs to explain to us what, as he supposes, the Law is: to that of the Censor, to observe to us what he thinks it ought to be. The former, therefore, is principally occupied in stating, or in inquiring after, facts: the latter, in discussing reasons. The Expositor, keeping within his sphere, has no concern with any other faculties of the mind than the apprehension, the memory, and the judgment: the latter, in virtue of those sentiments of pleasure or displeasure which he finds occasion to annex to the objects under his review, holds some intercourse with the affections. That which is Law, is, in

different countries, widely different: while that which ought to be, is in all countries to a great degree the same. The Expositor, therefore, is always the citizen of this or that particular country: the Censor is, or ought to be the citizen of the world. To the Expositor it belongs to shew what the Legislator and his underworkman the Judge have done already: to the Censor it belongs to suggest what the Legislator ought to do in future. To the Censor, in short, it belongs to teach that science, which when by change of hands converted into an art, the Legislator practises.

"Let us now return to our Author. Of these two perfectly distinguishable functions, the latter alone is that which it fell necessarily within his province to discharge. His professed object was to explain to us what the Laws of England were. '*Ita lex scripta est*,' was the only motto which he stood engaged to keep in view. The work of censure, (for to this word, in default of any other, I find it necessary to give a neutral sense,) the work of censure, as it may be styled, or, in a certain sense, of criticism, was to him but a parergon—a work of supererogation: a work, indeed, which, if aptly executed, could not but be of great ornament to the principal one, and of great instruction as well as entertainment to the reader, but from which our Author, as well as those that had gone before him on the same line, might, without being chargeable with any deficiency, have stood excused: a work which, when superadded to the principal, would lay the Author under additional obligations, and impose on him new duties: which, notwithstanding whatever else it might differ in from the principal one, agrees with it in this, that it ought to be executed with impartiality, or not at all.

"If, on the one hand, a hasty and undiscriminating condemner of what is established, may expose himself to contempt; on the other hand, a bigotted or corrupt defender of the works of power, becomes guilty, in a manner, of the abuses which he supports: the more so if, by oblique glances and sophistical glosses, he studies to guard from reproach, or recommend to favour, what he knows not how, and dares not attempt, to justify. To a man who contents himself with simply stating an institution as he thinks it is, no share, it is plain, can justly be attributed (nor would any one think of attributing to him any share) of whatever reproach, any more than of whatever applause the institution may be thought to merit. But if not content with this humbler function, he takes upon him to give reasons in behalf of it,

reasons whether made or found by him, it is far otherwise. Every false and sophistical reason that he contributes to circulate, he himself is chargeable with: nor ought he to be holden guiltless even of such as, in a work where fact, not reason, is the question, he delivers as from other writers without censure. By officiously adopting them he makes them his own, though delivered under the names of the respective authors: not much less than if delivered under his own. For the very idea of a reason betokens approbation: so that to deliver a remark under that character, and that without censure, is to adopt it. A man will scarcely, therefore, without some note of disapprobation, be the instrument of introducing, in the guise of a reason, an argument which he does not really wish to see approved. Some method or other he will take to wash his hands of it: some method or other he will take to let men see that what he means to be understood to do, is merely to report the judgment of another, not to pass one of his own. Upon that other then he will lay the blame: at least he will take care to repel it from himself. If he omits to do this, the most favourable cause that can be assigned to the omission is indifference: indifference to the public welfare—that indifference which is itself a crime."

* * * * *

"Of a piece with the discernment which enables a man to perceive, and with the courage which enables him to avow, the defects of a system of institutions, is that accuracy of conception which enables him to give a clear account of it. No wonder then, in a treatise partly of the expository class, and partly of the censorial, that if the latter department is filled with imbecility, symptoms of kindred weakness should characterize the former.

"The former department, however, of our Author's work, is what, on its own account merely, I should have found scarce myself disposed to intermeddle with. The business of simple exposition is a harvest in which there seemed no likelihood of there being any want of labourers: and into which therefore I had little ambition to thrust my sickle."

* * * * *

"The Introduction is the part to which, for reasons that have been already stated, it was always my intention to confine myself. It is but a part even of this Introduction that is the subject of the present Essay. What determined me to begin with this small part of it is, the facility I found in separating it from every

thing that precedes or follows it. This is what will be more particularly spoken to in another place.

" It is not that this part is among those which seemed most open to animadversion. It is not that stronger traces are exhibited in this part than in another of that spirit in our Author which seems so hostile to Reformation, and to that Liberty which is Reformation's harbinger.

" It is not here that he tramples on the right of private judgment, that basis of every thing that an Englishman holds dear. It is not here, in particular, that he insults our understandings with nugatory reasons; stands forth the professed champion of religious intolerance; or openly sets his face against civil reformation.

" It is not here, for example, he would persuade us, that a trader who occupies a booth at a fair is a fool for his pains; and on that account no fit object of the Law's protection.

" It is not here that he gives the presence of one man at the making of a Law, as a reason why ten thousand others that are to obey it, need know nothing of the matter.

" It is not here, that after telling us, in express terms, there must be an 'actual breaking' to make burglary, he tells us, in the same breath, and in terms equally express, where burglary may be without actual breaking; and this because 'the Law will not suffer itself to be trifled with.'

" It is not here, that after relating the Laws by which peaceable Christians are made punishable for worshipping God according to their consciences, he pronounces with equal peremptoriness and complacency, that every thing, yes, 'every thing is as it should be.'

" It is not here, that he commands us to believe, and that on pain of forfeiting all pretensions to either 'sense or probity,' that the system of our jurisprudence is, in the whole and every part of it, the very quintessence of perfection.

" It is not here that he assures us in point of fact, that there never has been an alteration made in the Law that men have not afterwards found reason to regret.

" It is not here that he turns the Law into a Castle, for the purpose of opposing every idea of 'fundamental' reparation.

" It is not here that he turns with scorn upon those beneficent Legislators, whose care it has been to pluck the mask of Mystery from the face of Jurisprudence.

"If here, as every where, he is eager to hold the cup of flattery to high station, he has stopt short, however, in this place, of idolatry.*

"It is not then, I say, this part, it is not even any part of that Introduction, to which alone I have any thoughts of extending my examination, that is the principal seat of that poison, against which it was the purpose of this attempt to give an antidote. The subject handled in this part of the work is such, as admits not of much to be said in the person of the Censor. Employed, as we have seen, in settling matters of a preliminary nature—in drawing outlines, it is not in this part that there was occasion to enter into the details of any particular institution. If I chose the Introduction then in preference to any other part, it was on account of its affording the fairest specimen of the whole, and not on account of its affording the greatest scope for censure.

"Let us reverse the tablet. While with this freedom I expose our Author's ill deserts, let me not be backward in acknowledging and paying homage to his various merits: a justice due, not to

* "In the Seventh Chapter of the First Book, the king has '*attributes*;' he possesses '*ubiquity*;' he is '*all-perfect* and *immortal*.' These childish paradoxes, begotten upon servility by false wit, are not more adverse to manly sentiment, than to accurate apprehension. Far from contributing to place the institutions they are applied to in any clear point of view, they serve but to dazzle and confound, by giving to reality the air of fable. It is true, they are not altogether our author's invention: it is he, however, that has revived them, and that with improvements and additions.

"One might be apt to suppose they were no more than so many transient flashes of ornament: it is quite otherwise. He dwells upon them in sober sadness. The attribute of '*ubiquity*,' in particular, he lays hold of, and makes it the basis of a chain of reasoning. He spins it out into consequences: he makes one thing '*follow*' from it, and another thing be so and so 'for the same *reason*:' and he uses emphatic terms, as if for fear he should not be thought to be in earnest. 'From the ubiquity,' says our author [1 Comm. p. 270] 'it *follows*, that the king can never be nonsuit; *for* a nonsuit is the desertion of the suit or action by the 'non-appearance of the plaintiff in Court.' ——'For the same reason also the king is not said to appear by his attorney, as other men do; for he always appears in contemplation of law in his *own proper* person.'

"This is the case so soon as you come to this last sentence of the paragraph. For so long as you are at the last but two, 'it is the regal office, and *not* the royal person, that is always present.' All this is so drily and so strictly true, that it serves as the ground work of a metaphor that is brought in to embellish and enliven it. The king, we see, *is*, that is to say is *not*, present in Court. The king's judges are present too. So far is plain downright truth. These judges, then, speaking metaphorically, are so many looking-glasses, which have this singular property, that when a man looks at them, instead of seeing his own face in them, he sees the king's. 'His judges,' says our author, 'are the mirror by which the king's image is reflected.'"

him alone, but to that Public, which now for so many years has been dealing out to him (it cannot be supposed altogether without title) so large a measure of its applause.

"Correct, elegant, unembarrassed, ornamented, the style is such, as could scarce fail to recommend a work still more vitious in point of matter to the multitude of readers.

"He it is, in short, who, first of all institutional writers, has taught Jurisprudence to speak the language of the Scholar and the Gentleman: put a polish upon that rugged science: cleansed her from the dust and cobwebs of the office: and if he has not enriched her with that precision that is drawn only from the sterling treasury of the sciences, has decked her out, however, to advantage, from the toilette of classic erudition: enlivened her with metaphors and allusions: and sent her abroad in some measure to instruct, and in still greater measure to entertain, the most miscellaneous and even the most fastidious societies.

"The merit to which, as much perhaps as to any, the work stands indebted for its reputation, is the enchanting harmony of its numbers: a kind of merit that of itself is sufficient to give a certain degree of celebrity to a work devoid of every other. So much is man governed by the ear."

* * * * *

"Not even in a censorial view would I be understood to deem them altogether without merit. For the institutions commented on, where they are capable of good reasons, good reasons are every now and then given: in which way, so far as it goes, one-half of the Censor's task is well accomplished. Nor is the dark side of the picture left absolutely untouched. Under the head of 'Trial by Jury,' are some very just and interesting remarks on the yet-remaining imperfections of that mode of trial: and under that of 'Assurances by matter of Record,' on the lying and extortious jargon of Recoveries. So little, however, are these particular remarks of a piece with the general disposition, that shews itself so strongly throughout the work, indeed so plainly adverse to the general maxims that we have seen, that I can scarce bring myself to attribute them to our Author. Not only disorder is announced by them, but remedies, well-imagined remedies, are pointed out. One would think some Angel had been sowing wheat among our Author's tares."

The warmth of Bentham's animadversions might be amply vindicated by their justice, and by the importance of the interests

which he had at heart; to his somewhat limited commendation should be added the following remarks of a distinguished editor of the Commentaries, admirable alike for their good feeling and discrimination. "It is easy to point out their faults; and their general merits of lucid order, sound and clear exposition, and a style almost faultless in its kind, are also easily perceived and universally acknowledged; but it requires, perhaps, the study necessarily imposed upon an editor, to understand fully the whole extent of praise to which the author is entitled; his materials should be seen in their crude and scattered state; the controversies examined, of which the result only is shortly given; what he has rejected, what he has forborne to say, should be known, before his learning, judgment, taste, and above all his total want of self-display, can be justly appreciated."—[*Preface to Coleridge's Blackstone.*]

On the style of the Commentaries, a high panegyric has been pronounced by no less a critic than C. J. Fox, in a letter addressed to Mr. Trotter. "You of course, read Blackstone over and over again; and if so, pray tell me whether you agree with me in thinking his style of English the very best among our modern writers; always easy and intelligible, far more exact than Hume, and less studied and made up than Robertson."* In the debate on the admission of Lord Ellenborough into the cabinet, the authority of Blackstone having been relied on, Fox said, "His purity of style I particularly admire. He was distinguished as much for simplicity and strength as any writer in the English language. He was perfectly free from all Gallicisms and ridiculous affectations, for which so many of our modern authors and orators are so remarkable. Upon this ground, therefore, I esteem Judge Blackstone; but as a constitutional writer he is by no means an object of my esteem; and for this amongst other reasons, that he asserts the latter years of the reign of Charles the Second (I mean those which followed the enactment of the *habeas corpus* act) to have been the most constitutional period to be found in our history, not excepting any period that followed. Now it would be inconsistent with all the principles which I have ever held, to regard such a writer as a constitutional authority, much less to look up to him as an oracle."†

* Trotter's Memoirs of Fox, p. 512. † Cobbett's Parl. Deb. Vol. 6, p. 314.

To these panegyrics may be added that of a writer whose judgment was always given in favour of elegant scholarship. "His Commentaries are the most correct and beautiful outline that ever was exhibited of any human science but they alone will no more form a lawyer, than a general map of the world, how accurately and elegantly soever it may be delineated, will make a geographer; if, indeed, all the titles which he professed only to sketch in elementary discourses were filled up with exactness and perspicuity, Englishmen might hope at length to possess a digest of their laws, which would leave but little room for controversy, except in cases depending upon their particular circumstances; a work which every lover of humanity and peace must anxiously wish to see accomplished." [*Sir W. Jones on Bailments.*]

The notes of decisions which he had collected while at the Bar and on the Bench, and which he had himself prepared for the press, were published after his death agreeably to a direction in his will, "That his Manuscript Reports of Cases determined in Westminster Hall, taken by himself, and contained in several large Note-books, be published after his decease.—And that the produce thereof be carried to, and considered as part of, his personal estate."

They seem to be only such as he had selected out of many from his rough notes, either as being of a more interesting nature, or containing some essential point of law or practice. By far the greatest part of those contained in the first volume, are of the Court of King's Bench, but there are some of the Courts of Chancery, Exchequer, and Exchequer Chamber on appeal. They begin with Michaelmas, 1746, the Term in which he was called to the Bar; and there are some of every Term, except two, to Michaelmas, 1750, from whence there is an interval to Michaelmas, 1756. This, probably, arose from his residence being chiefly at Oxford, during that period, and when much of his time had been occupied in composing his Lectures, which he began to read in 1753, and in preparing for which he had been for some years before principally employed. This accounts for his want of leisure to revise such rough notes as he might have taken during that period, and to fit them for publication, while they were fresh in his memory. In the three following years he attended the Bar only in Michaelmas and Hilary Terms, on ac-

count of his Lectures; consequently there are no Reports of cases decided during the Easter and Trinity Terms of those years; but from that time they continue in a regular series, with the exception of one Term, when he was indisposed, and the two Terms immediately preceding his being promoted to the Bench, when he attended the Court of Exchequer only. These circumstances sufficiently prove that those Reports were all taken by himself, except the arguments in the case of *Burgess* v. *Wheate*, in the Court of Chancery, in Hilary Term, 1759, which appears, by a remark subjoined, to have been communicated to him by Mr. Fazakerly.*

* A considerable portion of the above article is extracted from the memoir prefixed to Sir Wm. Blackstone's Reports, and written by his executor, Mr. James Clitherow, who observes, that "an intimate acquaintance with Mr. Justice Blackstone for above thirty years, the assistance of other friends who had known him much longer, and a short abstract of every circumstance of consequence in his life, written by himself with his accustomed accuracy, afford the editor ample materials for the purpose." This memoir has been corrected and the other materials have been arranged by the editor of the second volume.

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5. Municipal or civil law is the rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong . . . . . 44—47

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4. Particular customs are those which are only of use within some peculiar districts; as gavel-kind, the customs of London, &c. 74—76

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6. Particular laws are such as, by special custom, are adopted and used only in certain peculiar courts, under the superintendence and control of the common and statute law; namely, the Roman, civil, and canon laws . . . . . 79—84

7. The written or statute laws are the acts which are made by the king, lords, and commons, in parliament; to supply the defects, or amend what is amiss, of the unwritten law . 85—91

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10. The right of personal liberty consists in the free power of loco-motion, without illegal restraint or banishment 134—138

11. The right of private property consists in every man's free use and disposal of his own lawful acquisitions, without injury or illegal diminution . . . . . 138—140

12. Besides these three primary rights, there are others which are secondary and subordinate; viz. (to preserve the former from unlawful attacks) I. The constitution and power of Parliaments: II. The limitation of the king's prerogative:—and (to vindicate them when actually violated): III. The regular administration of public justice: IV. The right of petitioning for redress of grievances: V. The right of having and using arms for self-defence . . . . . 140—145

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6. The peculiar privileges of the lords (besides their judicial capacity) are to hunt in the king's forests; to be attended by the sages of the law; to make proxies; to enter protests; and to regulate the election of the sixteen peers of North-Britain 167—169

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8. At the Revolution, the convention of estates, or representative body of the nation, declared, that the misconduct of king James II. amounted to an abdication of the government, and that the throne was thereby vacant . . . . . 211—213

9. In consequence of this vacancy, and from a regard to the antient line, the convention appointed the next protestant heirs of the blood-royal of king Charles I. to fill the vacant throne, in the old order of succession; with a temporary exception, or preference, to the person of king William III. . . . . 214—216

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3. The direct prerogatives regard, I. The king's dignity, or royal character: II. His authority, or regal power: III. His revenue, or royal income . . . . . 240—241

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5. In the king's authority, or regal power, consists the executive part of government . . . . . 250—252

6. In foreign concerns; the king, as the representative of the nation, has the right or prerogative, I. Of sending and receiving ambassadors. II. Of making treaties. III. Of proclaiming war or peace. IV. Of issuing reprisals. V. Of granting safe-conducts . . . . . 252—261

7. In domestic affairs; the king is, first, a constituent part of the supreme legislative power; hath a negative upon all new laws; and is bound by no statute, unless specially named therein 261—262

8. He is also considered as the general of the kingdom, and may raise fleets and armies, build forts, appoint havens, erect beacons, prohibit the exportation of arms and ammunition, and confine his subjects within the realm, or recall them from foreign parts . . . . . *Page* 262—266

9. The king is also the fountain of justice, and general conservator of the peace; and therefore may erect courts, (wherein he hath a legal ubiquity), prosecute offenders, pardon crimes, and issue proclamations . . . . . 266—271

10. He is likewise the fountain of honour, of office, and of privilege . . . . . 271—273

11. He is also the arbiter of domestic commerce (not of foreign, which is regulated by the law of merchants); and is therefore entitled to the erection of public marts, the regulation of weights and measures, and the coinage or legitimation of money 273—279

12. The king is, lastly, the supreme head of the church; and, as such, convenes, regulates, and dissolves synods, nominates bishops, and receives appeals in all ecclesiastical causes 279—280

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7. The annual taxes are, I. The land-tax, or the antient subsidy raised upon a new assessment. II. The malt-tax, being an annual excise on malt, mum, cyder, and perry . . 309—314

8. The perpetual taxes are, I. The customs, or tonnage and poundage of all merchandize exported or imported. II. The excise duty, or inland imposition, on a great variety of commodities. III. The salt duty, or excise on salt. IV. The post office, or duty for the carriage of letters. V. The stamp duty on paper, parchment, &c. VI. The duty on houses and windows. VII. The duty on licenses for hackney coaches and chairs. VIII. The duty on offices and pensions . . . 314—328

9. Part of this revenue is applied to pay the interest of the national debt, till the principal is discharged by Parliament 328—329

10. The produce of these several taxes were originally separate and specific funds, to answer specific loans upon their respective credits; but are now consolidated by parliament into three principal funds, the aggregate, general, and South-sea funds, to answer all the debts of the nation: the public faith being also superadded, to supply deficiencies, and strengthen the security of the whole . . . . . 329—331

11. The surpluses of these funds, after paying the interest of the national debt, are carried together, and denominated the sinking fund: which, unless otherwise appropriated by Parliament, is annually to be applied towards paying off some part of the principal . . . . . 331—332

12. But, previous to this, the aggregate fund is now charged with an annual sum for the civil list; which is the immediate proper revenue of the crown, settled by Parliament on the king at his accession, for defraying the charges of civil government. 332—335

CHAPTER IX.

OF SUBORDINATE MAGISTRATES.

1. SUBORDINATE magistrates, of the most general use and authority, are, I. Sheriffs. II. Coroners. III. Justices of the peace. IV. Constables. V. Surveyors of the highways. VI. Overseers of the poor . . . . . *Page* 338—339

2. The sheriff is the keeper of each county, annually nominated in due form by the king; and is (within his county) a judge, a conservator of the peace, a ministerial officer, and the king's bailiff 339—346

3. Coroners are permanent officers of the crown in each county, elected by the freeholders; whose office it is to make inquiry concerning the death of the king's subjects, and certain revenues of the crown; and also, in particular cases, to supply the office of sheriff . . . . . 346—349

4. Justices of the peace are magistrates in each county, statutably qualified, and commissioned by the king's majesty; with authority to conserve the peace; to hear and determine felonies, and other misdemesnors; and to do many other acts, committed to their charge by particular statutes . . . 349—355

5. Constables are officers of hundreds and townships, appointed at the leet, and empowered to preserve the peace, to keep watch and ward, and to apprehend offenders . . . 355—357

6. Surveyors of the highways are officers appointed annually in every parish; to remove annoyances in, and to direct the reparation of, the public roads . . . . . 357—359

7. Overseers of the poor are officers appointed annually in every parish: to relieve such impotent, and employ such sturdy poor, as are settled in each parish,—by birth;—by parentage;—by marriage;—or by forty days' residence, accompanied with, I. Notice. II. Renting a tenement of ten pounds annual value. III. Paying their assessed taxations. IV. Serving an annual office. V. Hiring and service for a year. VI. Apprenticeship for seven years. VII. Having a sufficient estate in the parish 359—365

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OF THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.

1. The people are either aliens, that is, born out of the dominions, or allegiance, of the crown of Great Britain; or natives, that is, born within it . . . . . *Page* 366

2. Allegiance is the duty of all subjects; being the reciprocal tie of the people to the prince, in return for the protection he affords them; and in natives, this duty of allegiance is natural and perpetual; in aliens, is local, and temporary only . 366—371

3. The rights of natives are also natural and perpetual: those of aliens local and temporary only; unless they be made denizens by the king, or naturalized by Parliament . *Page* 371—375

CHAPTER XI.

OF THE CLERGY.

1. The people, whether aliens, denizens, or natives, are also either clergy, that is, all persons in holy orders, or in ecclesiastical offices; or laity, which comprehends the rest of the nation 376

2. The clerical part of the nation, thus defined, are I. Archbishops and bishops; who are elected by their several chapters, at the nomination of the crown, and afterwards confirmed and consecrated by each other. II. Deans and chapters. III. Archdeacons. IV. Rural deans. V. Parsons, (under whom are included appropriators) and vicars: to whom there are generally requisite, holy orders, presentation, institution, and induction. VI. Curates. To which may be added, VII. Churchwardens. VIII. Parish clerks and sextons . . . . . 377—395

CHAPTER XII.

OF THE CIVIL STATE.

1. The laity are divisible into three states; civil, military, and maritime 396

2. The civil state, which includes all the nation except the clergy, the army, and the navy; and many individuals among them also); may be divided into the nobility, and the commonalty 396

3. The nobility are dukes, marquesses, earls, viscounts, and barons. These had anciently duties annexed to their respective honours: they are created either by writ, that is, by summons to Parliament; or by the king's letters patent, that is, by royal grant: and they enjoy many privileges, exclusive of their senatorial capacity . . . . . *Page* 396—402

4. The commonalty consists of knights of the garter, knights bannarets, baronets, knights of the bath, knights bachelors, esquires, gentlemen, yeomen, tradesmen, artificers, and labourers 403—407

CHAPTER XIII.

OF THE MILITARY AND MARITIME STATES.

1. The military state, by the standing constitutional law, consists of the militia of each county, raised from among the people by lot, officered by the principal landholders, and commanded by the lord lieutenant . . . . . 408—413

2. The more disciplined occasional troops of the kingdom are kept on foot only from year to year, by Parliament; and, during that period, are governed by martial law, or arbitrary articles of war, formed at the pleasure of the crown . . 413—418

3. The maritime state consists of the officers and mariners of the British navy; who are governed by express and permanent laws, or the articles of the navy, established by act of Parliament 419—421

CHAPTER XIV.

OF MASTER AND SERVANT.

1. The private, œconomical relations of persons are those of, I. Master and servant. II. Husband and wife. III. Parent and child. IV. Guardian and ward 422

2. The first relation may subsist between a master and four species of servants (for slavery is unknown to our laws): viz. I. Menial servants, who are hired. II. Apprentices, who are bound by indentures. III. Labourers, who are casually employed. IV. Stewards, bailiffs, and factors; who are rather in a ministerial state . . . . . 423—427

3. From this relation result divers powers to the master, and emoluments to the servant . . . . . 427—428

4. The master hath a property in the service of his servant; and must be answerable for such acts as the servant does by his express or implied command . . . . . *Page* 429—432

CHAPTER XV.

OF HUSBAND AND WIFE.

1. THE second private relation is that of marriage; which includes the reciprocal rights and duties of husband and wife 433

2. Marriage is duly contracted between persons, I. Consenting. II. Free from canonical impediments, which make it voidable. III. Free also from the civil impediments,—of prior marriage;—of want of age;—of non-consent of parents or guardians, where requisite;—and of want of reason; either of which make it totally void. And it must be celebrated by a clergyman, in due form and place . . . . . 433—440

3. Marriage is dissolved, I. By death. II. By divorce in the spiritual court; not *a mensa et thoro* only, but *a vinculo matrimonii*, for canonical cause existing previous to the contract. III. By act of parliament, as, for adultery . . 440—442

4. By marriage the husband and wife become one person in law; which unity is the principal foundation of their respective rights, duties, and disabilities . . . . . 442—445

CHAPTER XVI.

OF PARENT AND CHILD.

1. THE third, and most universal, private relation is that of parent and child 446

2. Children are, I. Legitimate; being those who are born in lawful wedlock, or within a competent time after. II. Bastards, being those who are not so 446

3. The duties of parents to legitimate children are, I. Maintenance. II. Protection. III. Education . . 447—452

4. The power of parents consists principally in correction, and consent to marriage. Both may, after death, be delegated by will to a guardian; and the former also, living the parent, to a tutor or master . . . . . 452—453

5. The duties of legitimate children to parents are obedience, protection, and maintenance . . . . 453—454

6. The duty of parents to bastards is only that of maintenance *Page* 457—458

7. The rights of a bastard are such only as he can acquire; for he is incapable of inheriting any thing 459

CHAPTER XVII.

OF GUARDIAN AND WARD.

1. THE fourth private relation is that of guardian and ward, which is plainly derived from the preceding; these being, during the continuance of their relation, reciprocally subject to the same rights and duties 460

2. Guardians are of divers sorts: I. Guardians by nature, or the parents. II. Guardians for nurture, assigned by the ordinary. III. Guardians in socage, assigned by the common law. IV. Guardians by statute, assigned by the father's will. All subject to the superintendence of the Court of Chancery 461—463

3. Full age in male or female, for all purposes, is the age of twenty-one years (different ages being allowed for different purposes); till which age the person is an infant . 463—464

4. An infant, in respect of his tender years, hath various privileges, and various disabilities in law; chiefly with regard to suits, crimes, estates, and contracts . . . . . 464—466

CHAPTER XVII.

OF CORPORATIONS.

1. BODIES politic, or corporations, which are artificial persons, are established for preserving in perpetual succession certain rights; which, being conferred on natural persons only, would fail in process of time 467

2. Corporations are, I. Aggregate, consisting of many members. II. Sole, consisting of one person only 469

3. Corporations are also either spiritual, erected to perpetuate the rights of the church; or lay. And the lay are, I. Civil: erected for many temporal purposes. II. Eleemosynary; erected to perpetuate the charity of the founder . . 470—471

4. Corporations are usually erected, and named, by virtue of the king's royal charter; but may be created by act of Parliament 472—475

5. The powers incident to all corporations are, I. To maintain perpetual succession. II. To act in their corporate capacity like an individual. III. To hold lands, subject to the statutes of mortmain. IV. To have a common seal. V. To make by-laws. Which last power, in spiritual or eleemosynary corporations, may be executed by the king or the founder . *Page* 475—479

6. The duty of corporations is to answer the ends of their institution 479

7. To enforce this duty, all corporations may be visited: spiritual corporations by the ordinary; lay corporations by the founder, or his representatives; viz. the civil by the king (who is the *fundator incipiens* of all) represented in his Court of King's Bench; the eleemosynary by the endower (who is the *fundator perficiens* of such), or by his heirs or assigns . . . . . 480—484

8. Corporations may be dissolved, I. By act of Parliament. II. By the natural death of all their members. III. By surrender of their franchises. IV. By forfeiture of their charter . 484—485

INTRODUCTION.

SECTION I.

ON THE STUDY OF THE LAW.*

Mr. Vice-Chancellor, and Gentlemen of the University,

Prefatory remarks.

THE general expectation of so numerous and respectable an audience, the novelty, and (I may add) the importance of the duty required from this chair, must unavoidably be productive of great diffidence and apprehensions in him, who has the honour to be placed in it. He must be sensible how much will depend upon his conduct in the infancy of a study, which is now first adopted by public academical authority; which has generally been reputed (however unjustly) of a dry and unfruitful nature; and of which the theoretical, elementary parts have hitherto received a very moderate share of cultivation. He cannot but reflect, that, if either his plan of instruction be crude and injudicious, or the execution of it lame and superficial, it will cast a damp upon the farther progress of this most useful and most rational branch of learning; and may defeat, for a time, the public-spirited design of our wise and munificent benefactor. And this he must more especially dread, when he feels by experience how unequal his abilities are (unassisted by preceding examples) to complete, in the manner

[4]

* Read in Oxford at the opening of the Vinerian lectures, 25th Oct. 1758.

he could wish, so extensive and arduous a task; since he freely confesses, that his former more private attempts have fallen very short of his own ideas of perfection. And yet the candour he has already experienced, and this last transcendent mark of regard, his present nomination by the free and unanimous suffrage of a great and learned university (an honour to be ever remembered with the deepest and most affectionate gratitude), these testimonies of your public judgment must entirely supersede his own, and forbid him to believe himself totally insufficient for the labour, at least, of this employment. One thing he will venture to hope for, and it certainly shall be his constant aim, by diligence and attention to atone for his other defects; esteeming that the best return which he can possibly make for your favourable opinion of his capacity, will be his unwearied endeavours in some little degree to deserve it.

The study of our own laws much neglected.

The science thus committed to his charge to be cultivated, methodized, and explained in a course of academical lectures, is that of the laws and constitution of our own country: a species of knowledge in which the gentlemen of England have been more remarkably deficient than those of all Europe besides. In most of the nations on the continent, where the civil or imperial law, under different modifications, is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science, which is to be the guardian of his natural rights, and the rule of his civil conduct.

[5] Nor have the imperial laws been totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman; and a fashion has prevailed, especially of late, to transport the growing hopes of this island to foreign universities, in Switzerland, Germany, and

Holland; which, though infinitely inferior to our own in every other consideration, have been looked upon as better nurseries of the civil, or (which is nearly the same) of their own municipal law. In the meantime it has been the peculiar lot of our admirable system of laws to be neglected, and even unknown, by all but one practical profession; though built upon the soundest foundations, and approved by the experience of ages.

The study of the common law should be preferred to that of the civil law.

Far be it from me to derogate from the study of the civil law, considered apart from any binding authority as a collection of written reason. No man is more thoroughly persuaded of the general excellence of its rules, and the usual equity of its decisions, nor is better convinced of its use as well as ornament to the scholar, the divine, the statesman, and even the common lawyer. But we must not carry our veneration so far as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian: we must not prefer the edict of the prætor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament; unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridians the former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate.

Without detracting, therefore, from the real merit which abounds in the imperial law, I hope I may have leave to assert, that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions. For I think it an undeniable position, that a competent knowledge of the laws of that society in which we live is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education. And in this I am warranted by the example of ancient Rome, where, as Cicero informs us,[a] the very boys were obliged to learn the twelve tables by heart, as a *carmen necessarium*, or indispensable lesson, to imprint on their tender minds an early knowledge of the laws and constitution of their country[1].

[6]

[a] De Legg. 2. 23.

(1) Some of the laws of England have been promulgated to the people by being mingled with their religious services. Thus the Charter of Con-

Division of the subject of this section.

But as the long and universal neglect of this study with us in England, seems in some degree to call in question the truth of this evident position, it shall therefore be the business of this introductory discourse, in the first place, to demonstrate the utility of some general acquaintance with the municipal law of the land, by pointing out its particular uses in all considerable situations of life. Some conjectures will then be offered with regard to the causes of neglecting this useful study; to which will be subjoined a few reflections on the peculiar propriety of reviving it in our own universities.

I. Utility of some general knowledge of law to all classes,

And, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws. A land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution [b]. This liberty, rightly understood, consists in the power of doing whatever the laws permit [c]; which is only to be effected by a general conformity

[b] Montesq. Esp. L. l. 11. c. 5.

[c] *Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibetur.* Inst. l. 3. l.

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firmation, (25 Ed. 1,) enacted (cap. 3,) that the Great Charter of Henry the Third, and the Charter of the Forest, shall be read in the cathedral churches throughout the realm, before the people, twice in every year. A few years afterwards, (34 Ed. 1) still more careful provision was made for the promulgation of an equally important statute, *de tallagio non concedendo*; by cap. 6 of which statute it was provided that "all archbishops and bishops *for ever* shall read this present charter in the cathedral churches twice in the year; and upon the reading thereof shall openly denounce accursed all that willingly do, or procure to be done, any thing contrary to the tenor, force, and effect thereof, in any point or article whatever." By this solemn mode the legislature of old sought to impress a knowledge of their constitutional liberties upon the minds of persons of inferior condition, "who," according to Blackstone, "have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move." So, in the canons of 1603 it is enjoined, that every minister shall, in the parish church or chapel where he hath charge, read all the said canons, orders, ordinances and constitutions, once every year. More recent examples of this mode of promulgating particular laws to the common people may be found in 12 Anne, st. 2, c. 18, for preventing the pillaging of wrecks, fixing the amount of salvage, &c., which is directed (sec. 8) to be read four times during every year in all churches on the sea coasts,—and in the Marriage Act, (3 Geo. 4, c. 75), directed to be read in the churches thrice in each of the years 1822 and 1823. The above enactments are not affected by 7 Wm. 4, and 1 Vict. c. 45, which provides that written notices affixed on the church doors shall be good notices in cases of proclamations of outlawry, vestries, rates, &c., in lieu of reading the same during divine service.

of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest [2]. As therefore every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those, at least, with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under. And thus much may suffice for persons of inferior condition, who have neither [7] time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those on whom nature and fortune have bestowed more abilities and greater leisure, cannot be so easily excused. These advantages are given them, not for the benefit of themselves only, but also of the public; and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge in the laws. To evince this the more clearly, it may not be amiss to descend to a few particulars.

to gentlemen of independent fortune;

Let us, therefore, begin with our gentlemen of independent estates and fortune, the most useful, as well as considerable, body of men in the nation; whom even to suppose ignorant in this branch of learning is treated by Mr. Locke [d] as a strange absurdity. It is their landed property, with its long and voluminous train of descents and conveyances, settlements, entails, and incumbrances, that forms the most intricate and most extensive object of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is, perhaps, too laborious a task for any but a lawyer by profession; yet still the understanding of a few leading principles, relating to estates and conveyancing, may form some check and guard upon a gentleman's inferior agents, and preserve him at least from very gross and notorious impositions.

to testators,

Again, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation. An ignorance in these must

[d] Education. § 187.

(2) Some remarks are necessary upon this definition of civil liberty, but they will find a more appropriate place in the note to page 126.

always be of dangerous consequence to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all; so that in the end, his
[8] estate may often be vested quite contrary to these his enigmatical intentions, because, perhaps, he has omitted one or two formal words which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

to jurors, But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite; especially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity, even of our best juries, to do this with any tolerable propriety, has greatly debased their authority; and has unavoidably thrown more power into the hands of the judges to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

to justices of the peace, But it is not as a juror only, that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects: it is principally with this order of men that the commission of the peace is filled. And here a very ample field is open for a gentleman to exert his talents by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing petty differences, and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also (under which must be included the knowledge) of administering legal and effectual justice. Else, when he has
[9] mistaken his authority, through passion, through ignorance,

or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

to members of the House of Commons,

Yet farther: most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament; and those who are ambitious of receiving so high a trust, would also do well to remember its nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons, their estates, or their domestics; that they may list under party banners; may grant or withhold supplies; may vote with or vote against a popular or unpopular administration; but, upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and to cherish any solid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!

Indeed, it is perfectly amazing that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical; a long course of reading and study must form the divine, the physician, and the practical professor of the laws: but every man of superior fortune thinks himself born a legislator. Yet Tully was of a different opinion: "It is necessary (says he[e]) for a senator to be thoroughly acquainted with the constitution; and this (he declares) is a knowledge [10]

[e] De Legg. 3. 18. *Est senatori necessarium nosse rempublicam; idque latè patet:—genus hoc omne scientiæ, diligentiæ, memoriæ est: sine quo paratus esse senator nullo pacto potest.*

of the most extensive nature; a matter of science, of diligence, of reflection; without which no senator can possibly be fit for his office."

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question: and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity changed for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the English, as well as other courts of justice), owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament; "overladen (as Sir Edward Coke expresses it[f]) with provisoes and additions, and many times on a sudden penned or corrected by men of none, or very little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. "But if," he subjoins, "acts of parliament were after the old fashion penned, by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as also how far forth former statutes had provided remedy for former mischiefs, and defects discovered by experience; then should very few
[11] questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace, by construction of law, between insensible and disagreeing words, sentences, and provisoes, as they now do." And if this inconvenience was so heavily felt in the reign of Queen Elizabeth, you may judge how the evil is increased in later times, when the statute-book is swelled to ten times a larger bulk; unless it should be found, that the

[f] 2 Rep. pref.

penners of our modern statutes have proportionably better informed themselves in the knowledge of the common law.

to the nobility.

What is said of our gentlemen in general, and the propriety of their application to the study of the laws of their country, will hold equally strong, or still stronger, with regard to the nobility of this realm[3], except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence and concern; being not only by birth hereditary counsellors of the crown, and judges upon their honour of the lives of their brother-peers, but also arbiters of the property of all their fellow-subjects, and that in the last resort. In this their judicial capacity they are bound to decide the nicest and most critical points of the law: to examine and correct such errors as have escaped the most experienced sages of the profession, the lord-keeper, and the judges of the courts of Westminster. Their sentence is final, decisive, irrevo-

(3) "Many noblemen," says the oracle of the common law, (8 Rep. Pref.) "have been excellently learned in the laws of England, as, taking for example of many, Ranulph de Meschines, the great and worthy Earl of Chester, the third and last of that family, who having great knowledge and understanding in the laws of this land, compiled a book of the same, as a witness of his skill therein." Of this nobleman, Matthew Paris, (p. 362) and Holinshed, (vol. 2, p. 364) report (as the effect of his legal learning) that when one-tenth of all the moveables in this country had been demanded by the nuncio of Gregory 9th, to enable that pope to carry on the war against the Emperor Frederick; and when "in the parliament called to consider the pope's demand at Westminster, on the second Sundaie after Easter, in the year 1229, the king by his silence was adjudged to consent thereto, and the bishops, abbots, priors, and other ecclesiastical persons, (not without great grudging and murmuring), at length, for fear of excommunication by the nuncio, had also consented, and Stephen Segrave, one of the king's counsill, by compact (as was thought) with the nuncio, wrought so in the matter that the said tenths were finallie granted, and when the nuncio had begun to gather the same, and that by a verie straight and hard valuation, whereby the land was filled with bitter cursings, though in secret, by those which wished such unreasonable exactors might never see good ende of the use of that monie;—the Earle of Chester onlie stood manfullie against the paiment of those tenths, insomuch that he wold not suffer his lands to be brought under bondage, neither wold he permit the religious men and priests that held of his fee to pay the same, although the rest of England, Wales, Ireland, and Scotland were compelled to be contributorie thereto." The fearless stand which this "*invictus causidicus*," as Ranulph is styled in the Chronicle, made against this payment of tribute to a foreign potentate, was soon followed by various acts of parliament, forbidding submission to this "horrible mischief, and damnable custom." (Vide infra, p. 284.)

cable; no appeal, no correction, not even a review, can be had: and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady.

Should a judge in the most subordinate jurisdiction be deficient in the knowledge of the law, it would reflect infinite contempt upon himself, and disgrace upon those who employ him, and yet the consequence of his ignorance is comparatively very trifling and small: his judgment may be examined, and his errors rectified, by other courts. But, how much more serious and affecting is the case of a superior
[12] judge, if without any skill in the laws he will boldly venture to decide a question upon which the welfare and subsistence of whole families may depend! where the chance of his judging right or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the most alarming nature, an injury without possibility of redress.

Yet, vast as this trust is, it can no where be so properly reposed, as in the noble hands where our excellent constitution has placed it; and therefore placed it, because, from the independence of their fortune and the dignity of their station, they are presumed to employ that leisure which is the consequence of both, in attaining a more extensive knowledge of the laws than persons of inferior rank; and because the founders of our polity relied upon that delicacy of sentiment, so peculiar to noble birth; which, as on one hand it will prevent either interest or affection from interfering in questions of right; so on the other it will bind a peer in honour, an obligation which the law esteems equal to another's oath, to be master of those points upon which it is his birthright to decide.

The Roman pandects will furnish us with a piece of history not inapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scævola, the then oracle of the Roman law; but, for want of some knowledge in that science, could not so much as understand even the technical terms, which his friend was obliged to make use of. Upon which, Mutius Scævola could not forbear to upbraid him with this memo-

rable reproof[g], "that it was a shame for a patrician, a nobleman, and an orator of causes, to be ignorant of that law in which he was so peculiarly concerned." This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law; wherein he arrived to that proficiency, that he left behind [13] him about a hundred and fourscore volumes of his own compiling upon the subject; and became, in the opinion of Cicero[h], a much more complete lawyer than even Mutius Scævola himself.

to the gentry,

I would not be thought to recommend to our English nobility and gentry, to become as great lawyers as Sulpicius; though he, together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise, indefatigable senator; but the inference which arises from the story is this, that ignorance of the laws of the land hath ever been esteemed dishonourable in those, who are intrusted by their country to maintain, to administer, and to amend them.

But surely there is little occasion to enforce this argument any farther to persons of rank and distinction, if we of this place may be allowed to form a general judgment from those who are under our inspection: happy that while we lay down the rule, we can also produce the example. You will therefore permit your professor to indulge both a public and private satisfaction, by bearing this open testimony; that, in the infancy of these studies among us, they were favoured with the most diligent attendance, and pursued with the most unwearied application, by those of the noblest birth and most ample patrimony; some of whom are still the ornaments of this seat of learning; and others at a greater distance continue doing honour to its institutions, by comparing our polity and laws with those of other kingdoms abroad, or exerting their senatorial abilities in the councils of the nation at home.

to the clergy.

Nor will some degree of legal knowledge be found in the least superfluous to persons of inferior rank; especially those of the learned professions. The clergy, in particular, besides the common obligations they are under in proportion to their

[g] Ff. 1. 2. 2. § 43. *Turpe esse patricio, et nobili, et causas oranti, jus in quo versaretur ignorare.*

[h] Brut. 41.

rank and fortune, have also abundant reason, considered
[14] merely as clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacal contracts; to uniformity, residence, and pluralities; to tithes, and other ecclesiastical dues; to marriages (more especially of late), and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension; which is no otherwise to be acquired, than by use, and a familiar acquaintance with legal writers.

to physicians, For the gentlemen of the faculty of physic, I must frankly own that I see no special reason, why they in particular should apply themselves to the study of the law, unless in common with other gentlemen, and to complete the character of general and extensive knowledge; a character which their profession, beyond others, has remarkably deserved. They will give me leave, however, to suggest, and that not ludicrously, that it might frequently be of use to families, upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments, at least so far as relates to the formal part of their execution.

and to civilians and ecclesiastical lawyers. But those gentlemen who intend to profess the civil and ecclesiastical laws, in the spiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom [4]: they are no more binding in England, than our laws are binding at Rome. But as far as these foreign laws, on account of some peculiar propriety, have in some particular cases, and in some particular courts, been introduced and allowed by our laws, so far they oblige, and no farther; their authority being wholly founded upon that permission and adoption.
[15] In which we are not singular in our notions: for, even in

(4) Vide infra, pp. 79, 84, and vol. 3, p. 101.

Holland, where the imperial law is much cultivated, and its decisions pretty generally followed, we are informed by Van Leeuwen[i], that "it receives its force from custom, and the consent of the people, either tacitly or expressly given: for otherwise (he adds) we should no more be bound by this law, than by that of the Almains, the Franks, the Saxons, the Goths, the Vandals, and other of the ancient nations." Wherefore, in all points in which the different systems depart from each other, the law of the land takes place of the law of Rome, whether ancient or modern, imperial or pontifical. And, in those of our English Courts, wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them; or if such courts proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land, the common law in either instance, both may, and frequently does, prohibit and annul their proceedings[k]: and it will not be a sufficient excuse for them to tell the king's courts at Westminster, that their practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota, or imperial chamber.

For which reason it becomes highly necessary for every civilian and canonist, that would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases, and how far, the English laws have given sanction to the Roman; in what points the latter are rejected; and where they are both so intermixed and blended together, as to form certain supplemental parts of the common law of England, distinguished by the titles of the king's maritime, the king's military, and the king's ecclesiastical law. The propriety of which inquiry the university of Oxford has, for more than a century, so thoroughly seen, that in her statutes[l] she appoints, that one of the three questions to be annually discussed at the act, by the juris-inceptors, shall relate to the common law; subjoining this reason, "*quia juris civilis studiosos decet haud imperitos esse* [16]"

[i] *Dedicatio corporis juris civilis.* Edit. 1663.

[k] Hale Hist. C. L. c. 2. Selden in Fletam. 5 Rep. Caudrey's case. 2 Inst. 599.

[l] Tit. VII. Sect. 2. § 2.

juris municipalis, et differentias exteri patriique juris notas habere." And the statutes [m] of the university of Cambridge speak expressly to the same effect.

From the general use and necessity of some acquaintance with the common law, the inferences were expressly easy with regard to the propriety of the present institution, in a place to which gentlemen of all ranks and degrees resort, as the fountain of all useful knowledge. But how it has come to pass that a design of this sort has never before taken place in the university, and the reason why the study of our laws has, in general, fallen into disuse, I shall previously proceed to inquire.

II. Causes of the neglect of the study of the law.

Sir John Fortescue, in his panegyric on the laws of England (which was written in the reign of Henry the Sixth), puts a very [n] obvious question in the mouth of the young prince, whom he is exhorting to apply himself to that branch of learning: "why the laws of England, being so good, so fruitful, and so commodious, are not taught in the universities, as the civil and canon laws are?" In answer to which he gives [o] what seems, with due deference be it spoken, a very jejune and unsatisfactory reason; being, in short, that "as the proceedings at common law were in his time carried on in three different tongues, the English, the Latin, and the French, that science must be necessarily taught in those three several languages; but that in the universities, all sciences were taught in the Latin tongue only;" and therefore he concludes, "that they could not be conveniently taught or studied in our universities." But, without attempting to examine seriously the validity of this reason (the very shadow of which, by the wisdom of our late constitutions, is entirely taken away), we perhaps may find out a better, or at least a more plausible account, why the study of the municipal laws has been banished from these seats of science, than what the learned chancellor thought it prudent to give to his royal pupil.

[17] That ancient collection of unwritten maxims and customs, which is called the common law, however compounded, or

[m] *Doctor legum mox a doctoratu dabit operam legibus Angliæ, ut non sit imperitus earum legum quas habet sua patria, et differentias exteri patriique juris noscat.* Stat. Eliz. R. c. 14. Cowel. Institut. in proëmio.

[n] c. 47.

[o] c. 48.

from whatever fountains derived, had subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest. This had endeared it to the people in general, as well because its decisions were universally known, as because it was found to be excellently adapted to the genius of the English nation. In the knowledge of this law consisted great part of the learning of those dark ages; it was then taught, says Mr. Selden [p], in the monasteries, *in the universities*, and in the families of the principal nobility. The clergy in particular, as they then engrossed almost every other branch of learning, so (like their predecessors the British Druids) [q] they were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them soon after the conquest by William of Malmesbury [r]. The judges therefore were usually created out of the sacred order [s], as was likewise the case among the Normans [t]; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day.

The irruption of the foreign clergy,

But the common law of England, being not committed to writing, but only handed down by tradition, use, and experience, was not so heartily relished by the foreign clergy, who came over hither in shoals during the reign of the Conqueror and his two sons, and were utter strangers to our constitution as well as our language. And an accident which soon after happened, had nearly completed its ruin. A copy of Justinian's pandects, being newly [u] discovered at Amalsi, soon brought the civil law into vogue all over the west of Europe [5], where before it was quite laid aside [w], and in a manner forgotten, though some traces of its authority re- [18]

[p] In Fletam. 7. 7.

[q] Cæsar de bello Gal. 6. 13.

[r] De gest. reg. l. 4.

[s] Dugdale Orig. jurid. c. 8.

[t] *Les juges sont sages personnes et autentiques, — sicome les archevesques, evesques, les chanoines des eglises cathedraulx, et les autres personnes qui ont dignitez in sainctes eglises; les abbez, les prieurs conventaulx, et les gouverneurs des eglises, &c.* Grand Coustumier, ch. 9.

[u] Circ. A. D. 1130.

[w] LL. Wisigoth. 2. 1. 9.

(5) Mr. Hallam has shown some reasons for doubting this statement. (Mid. Ag. III. 513.)

mained in Italy [x] and the eastern provinces of the empire [y]. This now became in a particular manner the favourite of the popish clergy, who borrowed the method and many of the maxims of the canon law from this original. The study of it was introduced into several universities abroad, particularly that of Bologna, where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science; and many nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peaceable forms of government, adopted the civil law (being the best written system then extant), as the basis of their several constitutions; blending and interweaving it among their own feodal customs, in some places with a more extensive, in others a more confined authority [z].

who preferred the civil law.

Nor was it long before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the see of Canterbury [a], and extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and among the rest Roger surnamed Vacarius, whom he placed in the university of Oxford [b], to teach it to the people of this country. But it did not meet with the same easy reception in England, where a mild and rational system of laws had been long established, as it did upon the continent; and though the monkish clergy (devoted to the will of a foreign primate) received it with eagerness and zeal, yet the laity, who were more interested to preserve the old constitution, and had already severely felt the effect of many Norman innovations, continued wedded to the use of the common law. King Stephen immediately published a proclamation [c], forbidding the study of the laws, then newly imported from Italy, which was treated by the monks [d] as a piece of impiety, and though it might prevent the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries.

[19]

[x] Capitular. Hludov. Pii. 4. 102.

[y] Selden in Fletam. 5. 5.

[z] Domat's treatise of laws, c. 13, § 9. Epistol. Innocent IV. in M. Paris ad A. D. 1254.

[a] A. D. 1138.

[b] Gervas. Dorobern. Act. Pontif. Cantuar. col. 1665.

[c] Rog. Bacon, citat. per Selden in Fletam. 7. 6. in Fortesc. c. 33. & 8 Rep. Pref.

[d] Joan. Sarisburiens. Polycrat. 8, 22.

From this time the nation seems to have been divided into two parties; the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil and canon laws, which now came to be inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law, both of them reciprocally jealous of what they were unacquainted with, and neither of them perhaps allowing the opposite system that real merit which is abundantly to be found in each. This appears, on the one hand, from the spleen with which the monastic writers [e] speak of our municipal laws upon all occasions; and on the other, from the firm temper which the nobility showed at the famous parliament of Merton, when the prelates endeavoured to procure an act, to declare all bastards legitimate in case the parents intermarried at any time afterwards, alleging this only reason, because holy church (that is, the canon law) declared such children legitimate; but "all the earls and barons (says the parliament roll [f]) with one voice answered, that they would not change the laws of England which had hitherto been used and approved." And we find the same jealousy prevailing above a century afterwards [g], when the nobility declared with a kind of prophetic spirit, "that the realm of England hath never been unto this hour, neither by the consent of our lord the king and the lords of parliament, shall it ever be, ruled or governed by the civil law [h]." And of this temper between the clergy and laity many more instances might be given.

and endeavoured to introduce it into this country.

[20]

While things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts [6]; and to

The withdrawal of the clergy from practice.

[e] Joan. Sarisburiens. Polycrat. 5. 16. Polydor. Virg. Hist. l. 9.

[f] Stat. Merton. 20 Hen. III. c. 9. *Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.*

[g] 11 Ric. II.

[h] Selden. Jan. Anglor. l. 2. § 43. in Fortesc. c. 33.

(6) The withdrawal of the clergy from practice in the temporal courts gave birth to the common lawyers as a distinct class, who thenceforth made the most vigilant, firm, and successful opposition to every effort of the Anglican hierarchy to free themselves from the control of the law. The following is an outline of the rise and progress of this animosity, which has materially influenced the result of several important contests in the history of our constitution.

Before the Reformation the Papal

that end, very early in the reign of King Henry the Third, episcopal constitutions were published[1], forbidding all eccle-

[1] Spelman. Concil. A. D. 1217. Wilkins, vol. 1, p. 574, 599.

hierarchy had two objects of ambition: the one, the withdrawal of all spiritual persons from lay jurisdiction; the other, the acquisition of an exclusive jurisdiction for the spiritual courts over "divine matters." Their struggles for the former were nipped in the bud by the Constitutions of Clarendon, while the writ of prohibition checked every attempt to seize upon the latter. To free himself from the control of this writ, which was a curb on the pride of papal prelates, when their feet were on the necks of king, barons, and people, Archbishop Boniface struggled most vehemently in the reign of Henry 3, fairly trying his strength against that of the courts of common law, by threatening the judges of those courts with "especial excommunication" if they should dare to issue prohibitions on the matters specified in his celebrated *articuli cleri*. "Yet," says Lord Coke, (2 Inst. 599) "notwithstanding the greatness of the archbishop, and that divers of the judges were clergy, and all the great officers of state, the judges proceeded according to the laws of the realm, and still kept, though with great difficulty, the ecclesiastics within proper bounds." Hallam's Mid. Ag. ii. 315. See also and compare Glanvil. l. 4. c. 13, l. 12. c. 21. 22. with the full account of the law of prohibitions, contained in the 5th book of Bracton. The former was appointed Chief Justiciary of England by Hen. 2, A. D. 1180, the latter by Hen. 3, A. D. 1253. The reader need scarcely be reminded that from the earliest times every object of ecclesiastical ambition has been claimed "*jure divino*;" that is, by a title paramount to all human laws, and not to be examined except by spiritual persons.

At the Reformation, if we select the point upon which the contending parties came to issue, we shall find the lawyers at their post. The contending parties came to issue in the parliament held in the 21 Hen. 8, and on the abuses of the church. In that parliament three bills were sent up to the lords from the commons, levelled, the one against unreasonable exactions of fees for the probate of wills, another against mortuaries, and the third to restrain pluralities and non-residence, to forbid the clergy taking farms, &c., and to confine them to a due discharge of their functions. "The clergy," says Bishop Burnett, (Hist. Ref. i. 80.) "suffered a severe blow by these bills, for they not only felt an immediate restraint and lost a present profit, but a door was opened for the many mortifying regulations which soon followed." See also Reeve's Hist. of Engl. Law, vol. 4, pp. 205, 211. By whose efforts were the House of Commons induced to aim "this severe blow," and to "open the door of the Reformation"? We learn from Hall, (Chron. p. 766,) that while the commons were "in sore debate" on the above three bills, they were much exasperated by an intemperate speech of Bishop Fisher's, which, besides maintaining the exemption of the clergy from parliamentary control, and advancing the old claim of *jus divinum*, and so forth, charged the House of Commons as a body with "lacke of faith." When this speech came to the knowledge of the House of Commons, the debate on these bills was stopped, and the members were addressed on the subject of their "lacke of faith," by a "gentleman of Greye's Inn," in a speech of marvellous power, and of then unprecedented boldness; after hearing which the House made a formal complaint to the king against the bishop. The bishop "explained," but when the debate was resumed, every one of these

siastics to appear as advocates *in foro sæculari;* nor did they long continue to act as judges there, not caring to take the

three bills was passed, and the first effectual blow thus struck in the House of Commons against the *jus divinum* of the hierarchy. "These things," continues the chronicler, "against the power of the clergy, before this time durst in no wise be touched, nor yet talked of by no man, unless he would run the hazard of being judged an heretic, and lose all that he had, for as the bishops were always chancellors, and had all the rule about the king, so that no man durst once presume to attempt any thing contrary to their profitte and advantage." Before this speech, (Lord Herbert's Life of Hen. 8, pp. 321, 324), no man in the House of Commons durst attack the power of the church, for certain ruin would fall upon him; but after this speech the House resolved that a reformation of the clergy was necessary, and bills for that purpose were passed in spite of all their outcries. These acts were: the act against appeals to Rome (24 Hen. 8, c. 12), for the submission of the clergy (25 Hen. 8, c. 19), against payment of first fruits to the pope, and for the election of bishops (c. 20), against Peter's pence and dispensations (c. 21), for the king's supremacy (26 Hen. 8, c. 1), for the suppression of the lesser monasteries (27 Hen. 8, c. 28), for extinguishing the authority of the bishop of Rome (28 Hen. 8, c. 10), and for the total suppression of the monasteries (30 Hen. 8, c. 13). Besides the above "gentleman of Greye's Inn," Sir Thomas Audley, attorney general of the duchy of Lancaster, and afterwards Lord Chancellor, was conspicuous in forcing the House of Commons forwards, and it is also incidently mentioned by Hall, that "other learned men in the law, being of the Commons' House, took much payne." The speeches of Bishop Fisher and "the gentleman of Greye's Inn" are set forth, Parl. Hist., vol. 1, p. 502-6, and are highly interesting, not only as specimens of parliamentary oratory three centuries ago, but as being the speeches which "opened the door" of the Reformation, and induced the parliament to pass a series of statutes, which prevented that door from being ever thereafter closed.

Even during the reign of Elizabeth, the animosity between the lawyers and the clergy was not entirely dormant; for we find the jealousy between the common lawyers and the civilians breaking out in the House of Commons during the debate on the *ex officio* oath (1592). Many of Whitgift's and Bancroft's letters contain murmurs at the subjection of the clergy to tribunals composed of lay lawyers, "whose learning," says Whitgift, (Letter cited, Hallam, C. H. i. 288,) is no learning any where but here at home, and of whom, many an one, being born to nothing, doth by his labour and travail in this barbarous knowledge, (of the common law), purchase to himself and his heirs for ever a thousand pounds per annum, and oftentimes much more." These were but the forerunners of the open rupture, which took place in the next reign. No sooner had James 1. ascended the throne, than we find the prelates renewing their claims to a jurisdiction beyond the control of the courts of common law, and making especial remonstrance against the use of the writ of prohibition. The exact nature of these ecclesiastical demands will be learned from a survey of the canons of 1603, (vide infra, p. 83,) and the *articuli cleri* of Bancroft, (for which see Coke's 2 Inst. 599.) "The favourite object of the bishops in the reign of James 1st," says Mr. Hallam, (C. H. i. 440.) "was to render their ecclesiastical jurisdiction as unrestrained as possible by the courts of law, and

oath of office which was then found necessary to be administered, that they should in all things determine according

to effect the subjugation of the common lawyers." (ii. 63.) The successful opposition made by the judges to the pretensions of Bancroft only served to exasperate both parties, and to aggravate that jealousy of the ecclesiastical courts, which the common lawyers had long entertained. In 1611 we find Bancroft complaining of the power and popularity of the common lawyers, in answer to a petition from the doctors of the Arches, expressly requesting his grace to favour them against the common lawyers, (Strype's Whitgift, App. p. 227.) The difficulties thrown by the lawyers in the way of Charles I. and Archbishop Laud, each struggling vigorously to set up a *jus divinum*, and each assisting the efforts of the other, are frequent themes in the correspondence between that prelate and Strafford. "The church," says Laud, in 1633, (letter cited Hallam. C. H. ii. 65.) "is so bound up in the forms of the common law, that it is not possible for me or for any man to do that good which he would or is bound to do. For your lordship sees, that the lawyers, who have gotten so much power in and over the church, will not let go their hold." Clarendon also justly remarks that the unwarrantable opposition of the spiritualty to prohibitions, and their claims to the possession of an uncontrolled authority, ultimately led to the ruin of Laud and of the church, by bringing upon them "the great herd of common lawyers." The noble historian concludes, however, his review of the faults of both parties, with expressing his own conviction, that the fatal issue of that struggle was an instance of the divine anger against the pride of both churchmen and lawyers. (Hist. of Rebellion, ii. 34.) If we are to believe Whitelocke's speech to the House of Commons in 1649, (Parl. Hist. iii. 1341,) the lawyers had borne no mean part in the field of battle on the side of the parliament. "The gown," says Whitlocke, "does not abate either a man's courage or his wisdom, or render him less capable of using a sword. You all know this to be true, by the great services performed by lieutenant-general Jones, and commissary Ireton, and many of the members and other lawyers, who, putting off their gowns, when you required it, have served you stoutly and successfully as soldiers, and undergone great dangers and hardships." Lastly, continuing our epitome into the despotism of the Commonwealth, we find in the Westminster assembly, Hale, Maynard, Wilde, Selden, Whitelocke, St. John, and other lawyers successfully resisting the attempts of the Presbyterians to clothe themselves with the *jus divinum*, which had been just stripped from the deposed hierarchy.

Here the traces of this animosity seem to cease, the supremacy of the law having since remained far above any attacks of prelates. Not but that there are still to be found a few modern civilians, who, thinking that this supremacy of law implies a superiority in lawyers, have naturally complained grievously on the subject. Collyer's Ecclesiastical History is full of repinings on this subject. So Bishop Gibson, in the preface to his Codex, (page 6,) says, "the common laws spiritual ought not to be dragged into the channel of the common law temporal, which is unnatural to them, and in which it is impossible for them to thrive." Bishop Burnet indeed seems to have thought, that antipathy to the national church is an inseparable characteristic of the lawyer. In his account of the contests between the French bishops and the parliament of Paris, in the beginning of the seventeenth century, respecting the right to the regale, is the following passage: "It has been every where observed,

to the law and custom of this realm [k]; though they still kept possession of the high office of chancellor; an office then of little juridical power; and afterwards, as its business increased by degrees, they modelled the process of the court at their own discretion.

The common law despised by the clergy,

But wherever they retired, and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, from the chancellor's courts in both our universities, and from the high court of chancery before mentioned; in all of which the proceedings are to this day in a course much conformed to the civil law: for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; pope Innocent the Fourth having forbidden [l] the very reading of it by the clergy, because its decisions were not founded on the imperial constitutions, but merely on the customs of the laity. And if it be considered, that our universities began about that period to receive their present form of scholastic discipline; that they were then, and continued to be till the time of the Reformation, entirely under [21] the influence of the popish clergy (Sir John Mason, the first protestant, being also the first lay chancellor of Oxford); this will lead us to perceive the reason why the study of the Roman laws was in those days of bigotry [m] pursued with such

[k] Selden in Fletam. 9. 3.

[l] M. Paris ad A. D. 1254.

[m] There cannot be a stronger instance of the absurd and superstitious veneration that was paid to these laws, than that the most learned writers of the times thought they could not form a perfect character even of the blessed virgin, without making her a civilian and a canonist; which Albertus Magnus, the renowned Dominican doctor of the thirteenth century, thus proves in his Summa de laudibus christiferæ virginis (divinum magis quam humanum opus) qu. 23, § 5. "*Item quod jura civilia, et leges, et decreta scivit in summo, probatur hoc modo; sapientia advocati manifestatur in tribus; unum,*

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that no sort of men have made head against those things which have been called rights of the church with more zeal and indignation than lawyers and secular courts. This ecclesiastics impute to their enmity to the church and their envy at her prosperity; lawyers, on the other hand, pretend that their studies carry them further than other men into the discovery of those cheats and late inventions, by which the world has been imposed on in former ages." (Rights of Princes, chap. 8.)

alacrity in these seats of learning; and why the common law was entirely despised, and esteemed little better than heretical.

and not encouraged in the universities.

And, since the Reformation, many causes have conspired to prevent its becoming a part of academical education. As, first, long usage and established custom; which, as in every thing else, so especially in the forms of scholastic exercise, have justly great weight and authority. Secondly, the real intrinsic merit of the civil law, considered upon the footing of reason and not of obligation, which was well known to the instructors of our youth; and their total ignorance of the merit of the common law, though its equal at least, and perhaps an improvement on the other. But the principal reason of all, that has hindered the introduction of this branch of learning, is, that the study of the common law, being banished from hence in the times of popery, has fallen into a quite different channel, and has hitherto been wholly cultivated in another place. But as the long usage and established custom, of ignorance of the laws of the land, begin now to be thought unreasonable; and as by these means the merit [22] of those laws will probably be more generally known; we may hope that the method of studying them will soon revert to its ancient course, and the foundations at least of that science will be laid in the two universities; without being exclusively confined to the channel which it fell into at the times I have just been describing.

For, being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved of course into the hands of laymen: who entertained upon their parts a most hearty aversion to the civil law [n] and made no scruple to profess their contempt, nay even their ignorance [o]

quod obtineat omnia contra judicem justum et sapientem; secundo, quod contra adversarium astutum et sagacem; tertio, quod in causa desperata: sed beatissima virgo, contra judicem sapientissimum, Dominum; contra adversarium callidissimum, dyabolum; in causa nostra desperata; sententiam optatam obtinuit." To which an eminent Franciscan, two centuries afterwards, Bernardinus de Busti, (Mariale, part 4, serm. 9,) very gravely subjoins this note: "*Nec videtur incongruum mulieres habere peritiam juris. Legitur enim de uxore Joannis Andreæ glossatoris, quod tantam peritiam in utroque jure habuit, ut publice in scholis legere ausa sit.*

[n] Fortesc. de laud. LL. c. 23.

[o] This remarkably appeared in the case of the abbot of Torun, M. 22 Edw. III. 24, who had caused a certain prior to be summoned to answer at Avignon for erecting an oratory *contra inhibitionem novi operis*; by which words Mr. Selden (in Flet. 8. 5) very justly understands to be meant the

of it, in the most public manner. But still as the balance of learning was greatly on the side of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and overrun by the civil (a suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta), had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to its support.

The court of common pleas fixed in one spot.

The incident which I mean was the fixing the court of common pleas, the grand tribunal for disputes of property, to be held in one certain spot; that the seat of ordinary justice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other superior courts, was held before the king's capital justiciary of England, in [23] the *aula regis*, or such of his palaces wherein his royal person resided; and removed with his household from one end of the kingdom to the other. This was found to occasion great inconvenience to the suitors; to remedy which it was made an article of the great charter of liberties, both that of king John and king Henry the Third[p], that "common pleas should no longer follow the king's court, but be held in some certain place:" in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. This brought together the professors of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons, who (as Spelman[q] observes), addicting themselves wholly to the study of the laws of the land, and no longer considering it as a mere subordinate science, for the amusement of leisure hours, soon raised those laws to that pitch of perfection, which

title *de novi operis nuntiatione* both in the civil and canon laws, (Ff. 39. 1. C. 8. 11, and Decretal. not Extrav. 5. 32.) whereby the erection of any new buildings in prejudice of more ancient ones was prohibited. But Skipwith, the king's serjeant, and afterwards chief baron of the exchequer, declares them to be flat nonsense: "*in ceux parols*, contra inhibitionem novi operis *ny ad pas entendment*:" and justice Scharddelow mends the matter but little by informing him, that they signify a restitution *in their law*: for which reason he very sagely resolves to pay no sort of regard to them, "*Ceo n'est que un restitution en leur ley, pur que a ceo n'avomus regard*, &c."

[p] c. 20, of the former, and c. 11, of the latter.

[q] Glossar. 334.

they suddenly attained under the auspices of our English Justinian, king Edward the First.

The institution of the inns of court.

In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order; and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times[7] certain houses (now called the inns of court and of chancery) between the city of Westminster, the place of holding the king's courts, and the city of London, for advantage of ready access to the one, and plenty of provisions in the other[r]. Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers (first styled apprentices[s] from *ap-*
[24] *prendre,* to learn) who answered to our bachelors: as the state and degree of a serjeant[t], *servientis ad legem,* did to that of doctor[8].

[r] Fortesc. c. 48.

[s] Apprentices or barristers seem to have been first appointed by an ordinance of king Edward the First in parliament, in the 20th year of his reign. (Spelm. Gloss. 37; Dugdale, Orig. Jurid. 55.)

[t] The first mention I have met with in our law books of serjeants or countors, is in the statute of Westm. 1, 3 Ed. 1. c. 29, and in Horn's Mirror, c. 1. § 10, c. 2. § 5, c. 3. § 1. in the same reign. But M. Paris, in his Life of John II, abbott of St. Alban's which he wrote in 1255, 39 Hen. III, speaks of advocates at the common law, or countors, (*quos banci narratores vulgariter appellamus,*) as of an order of men well known. And we have an example of the antiquity of the coif in the same author's history of England, A. D. 1259, in the case of one William de Bussy; who being called to account for his great knavery and malpractices, claimed the benefit of his orders or clergy, which till then remained an entire secret; and to that end *voluit ligamenta coifae suae solvere ut palam monstraret se tonsuram habere clericalem; sed non est permissus.*——*Satelles vero eum arripiens, non per coifae ligaminu sed per guttur eum apprehendens, traxit ad carcerem.* And hence sir H. Spelman conjectures (Glossar. 335,) that coifs were introduced to hide the tonsure of such renegade clerks, as were still tempted to remain in the secular courts in the quality of advocates or judges, notwithstanding their prohibition by canon.

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(7) In Doug. 340, Lord Mansfield said: "the original institution of the inns of court no where precisely appears; but it is certain that they are not corporations, and have no charter from the crown. They are voluntary societies, which for ages have submitted to government, analogous to that of other seminaries of learning." Dugdale's Origines Juridiciales, and Herbert's Antiquities of the Inns of Court and Chancery contain all the antiquarian and historical information respecting their original foundation, government, ceremonies, and customs.

(8) In Mr. Serjeant Manning's erudite treatise on the degree of

The crown seems to have soon taken under its protection this infant seminary of common law; and the more effectually to foster and cherish it, king Henry the Third, in the nineteenth year of his reign, issued out an order directed to the mayor and sheriffs of London, commanding that no regent of any law schools *within* that city should for the future teach law therein [u]. The word, law, or *leges*, being a general term, may create some doubt at this distance of time, whether the teaching of the civil law, or the common, or both, is hereby restrained. But in either case it tends to the same end. If the civil law only is prohibited (which is Mr. Selden's [w] opinion), it is then a retaliation upon the clergy, who had excluded the common law from *their* seats of learning. If the municipal law be also included in the restriction (as sir Edward Coke [x] understands it, and which the words seem to import), then the intention is evidently this; by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public university, which was newly instituted in the suburbs.

[u] *Ne aliquis scholas regens de legibus in eadem civitate de caetero ibidem leges doceat.*

[w] In Flet. 8. 2.

[x] 2 Inst. proem.

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serjeant-at-law, (*Serviens ad Legem,*) is collected all the learning on its origin, nature, and privileges. With respect to the degree of barrister-at-law, circumstances which occurred in the year 1832, shewing the necessity that this degree should not be a matter of right, gave rise to a direction to the common law commissioners, to inquire and report upon the subject. Their report contains all the information that could be found on the origin and history of the right claimed by the benchers of the four inns of court to call to the bar, and some suggestions of improvements in the exercise of this right. In 8 East. 213, the Court of Queen's Bench refused an application for a mandamus, by a person who had applied for admission to practise as an advocate in the spiritual courts, and had been rejected because he had been in deacon's orders. In *Wooler's case*, 4 B. & C. 855, the same court also refused a mandamus, and the judges also refused to interfere, as visitors, to compel the admission of a student; but with respect to the call to the bar, Mr. Justice Littledale said: "a member who has been suffered to incur expense with a view to his being called to the bar, thereby acquires an inchoate right to be called, and if the benchers refuse to call him, they ought to assign a reason for so doing; and if there be no reason, or an insufficient one, then the member, who has acquired such an inchoate right, is entitled to have that right perfected." In 5 A. & E. 17, a mandamus to the principal and antients of Barnard's Inn, to admit an attorney into that society, was refused, it not appearing that the Court of Queen's Bench had the requisite authority over that inn.

[25] In this juridical university (for such it is insisted to have been by Fortescue [y] and sir Edward Coke [z]) there are two sorts of collegiate houses; one called inns of *chancery*, in which the younger students of the law were usually placed, "learning and studying," says Fortescue [a], "the originals, and as it were the elements of the law; who, profiting therein as they grew to ripeness, so were they admitted into the *greater* inns of the same study, called the *inns* of court." And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm, did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by its practice: and that in his time there were about two thousand students at the several inns, all of whom he informs us were *filii nobilium*, or gentlemen born.

The nobility and gentry formerly studied at the inns of court.

Hence it is evident, that (though under the influence of the monks our universities neglected this study, yet) in the time of Henry the Sixth it was thought highly necessary, and was the universal practice, for the young nobility and gentry to be instructed in the originals and elements of the laws. But by degrees this custom has fallen into disuse; so that in the reign of queen Elizabeth sir Edward Coke [b] does not reckon above a thousand students, and the number at present is very considerably less. Which seems principally owing to these reasons: first, because the inns of chancery being now almost totally filled by the inferior branch of the profession, are neither commodious nor proper for the resort of gentlemen of any rank or figure; so that there are very rarely [9] any young students entered at the inns of chancery; secondly, because in the inns of court all sorts of regimen

[y] c. 49.
[z] 3 Rep. pref.
[a] c. 49.
[b] 3 Rep. pref.

(9) Gray's Inn, Lincoln's Inn, the Inner Temple, and Middle Temple, are the only societies, the members whereof are called to the bar. The Inns of Chancery are Barnard's Inn, Staple's Inn, Thavies's Inn, Clement's Inn, Clifford's Inn, Lyon's Inn, and New Inn. The first two belong to Gray's Inn, the next to Lincoln's Inn, the next three to the Inner Temple, and the last to the Middle Temple. Furnival's Inn, which formerly belonged to Lincoln's Inn, and the Strand Inn, which formerly belonged to the Middle Temple, have long ceased to exist as law societies. Admission to the Inns of Chancery has long been immaterial as regards a call to the bar. Serjeants' Inn is, and other places were, appropriated to serjeants-at-law.

and academical superintendence, either with regard to morals or studies, are found impracticable, and therefore entirely neglected [10]; lastly, because persons of birth and fortune, after having finished their usual courses at the universities, have seldom leisure or resolution sufficient to enter upon a [26] new scheme of study at a new place of instruction. Wherefore few gentlemen now resort to the inns of court, but such for whom the knowledge of practice is absolutely necessary; such I mean as are intended for the profession: the rest of our gentry (not to say our nobility also) having usually retired to their estates, or visited foreign kingdoms, or entered upon public life, without any instruction in the laws of the land, and indeed with hardly any opportunity of gaining instruction, unless it can be afforded them in these seats of learning.

III. On the peculiar propriety of reviving its study in the universities.

And that these are the proper places for affording assistances of this kind to gentlemen of all stations and degrees, cannot (I think) with any colour of reason be denied. For not one of the objections which are made to the inns of court and chancery, and which I have just now enumerated, will hold with regard to the universities. Gentlemen may here associate with gentlemen of their own rank and degree. Nor are their conduct and studies left entirely to their own discretion: but regulated by a discipline so wise and exact, yet so liberal, so sensible, and manly, that their conformity to its rules (which does at present so much honor to our youth) is not more the effect of constraint than of their own inclinations and choice. Neither need they apprehend too long an avocation hereby from their private concerns and amusements, or (what is a more noble object) the service of their friends and their country. This study will go hand in hand with their other pursuits: it will obstruct none of them, it will ornament and assist them all.

Nature of an university.

But if, upon the whole, there are any still wedded to monastic prejudice, that can entertain a doubt how far this study is properly and regularly *academical*, such persons I am afraid either have not considered the constitution and

(10) Nevertheless the benchers claim, and have occasionally exercised, the power to disbar members after they are called to the degree of barrister-at-law.

design of an university, or else think very meanly of it. It must be a deplorable narrowness of mind, that would confine these seats of instruction to the limited views of one or two learned professions. To the praise of this age be it spoken,
[27] a more open and generous way of thinking begins now universally to prevail. The attainment of liberal and genteel accomplishments, though not of the intellectual sort, has been thought by our wisest and most affectionate patrons [c], and very lately by the whole university [d], no small improvement of our ancient plan of education: and therefore I may safely affirm that nothing (how *unusual* soever) is, under due regulations, improper to be *taught* in this place, which is proper for a gentleman to *learn*. But that a science, which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other; which employs in its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart; a science, which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community [11]; that a science like this should ever

[c] Lord chancellor Clarendon, in his dialogue of education, among his tracts, p. 325, appears to have been very solicitous, that it might be made "a part of the ornament of our learned academies to teach the qualities of riding, dancing, and fencing, at those hours when more serious exercises should be intermitted."

[d] By accepting in full convocation the remainder of lord Clarendon's history from his noble descendants, on condition to apply the profits arising from its publication to the establishment of a *manage* in the university.

(11) This is the panegyrick of a lawyer; but the peroration of the first book of Hooker's Ecclesiastical Polity is to the same effect: "Of law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world; all things in heaven and earth do her homage, the very least as freely her care, the greatest as not exempted from her power; both angels and men and creatures of what condition soever, though each in different sort and manner, yet all, with uniform consent, admiring her as the mother of their peace and joy."

"I might instance," (says Bolingbroke, Study of History, p. 353,) "in other professions, the obligation men lie under of applying to certain parts of history; and I can hardly forbear doing it in that of the law, in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and the most pernicious. A lawyer now is nothing more, I speak of ninety-nine in a hundred at least, to use some of Tully's words, *nisi leguleius quidem cautus, et acutus præco actionum, cantor formularum, auceps syllabarum.* But there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons. There will be none such any more, till in some better age true

have been deemed unnecessary to be studied in an university, is matter of astonishment and concern. Surely, if it were not before an object of academical knowledge, it was high time to make it one: and to those who can doubt the propriety of its reception among us (if any such there be), we may return an answer in their own way, that ethics are confessedly a branch of academical learning; and Aristotle himself has said, speaking of the laws of his own country, that jurisprudence, or the knowledge of those laws, is the principal and most perfect branch of ethics[e].

The Vinerian foundation for this object.

From a thorough conviction of this truth, our munificent benefactor, Mr. Viner, having employed above half a century in amassing materials for new modelling and rendering more commodious the rude study of the laws of the land, consigned both the plan and execution of these his public-spirited designs to the wisdom of his parent university. Resolving to dedicate his learned labours "to the benefit of

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[e] Τελεία μάλιστα αρετή, ὅτι τῆς τελείας αρετῆς χρῆστίς ἐστι. Ethic. ad Nicomach. l. 5, c. 3.

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ambition or the love of fame prevails over avarice; and till men find leisure and encouragement to prepare themselves for the exercise of this profession, by climbing up to the vantage ground, so my Lord Bacon calls it, of science, instead of grovelling all their lives below in a mean but gainful application to all the little arts of chicane. Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions; and whenever it happens, *one of the vantage grounds to which men must climb is metaphysical, and the other, historical knowledge.* They must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws; and they must trace the laws of particular states, especially of their own, from the first rough sketches to the more perfect draughts; from the first causes or occasions that produced them, through all the effects good and bad, that they produced." "Law," said Dr. Johnson, "is the science in which the greatest powers of understanding are applied to the greatest number of facts." "And no one," said Sir James Mackintosh, "who is acquainted with the variety and multiplicity of the subjects of jurisprudence, and with the prodigous powers of discrimination employed upon them, can doubt the truth of this observation."

The science of jurisprudence is the pride of the human intellect, which with all its defects, redundancies, and errors, is the collected reason of ages combining the principles of original justice with the infinite variety of human concerns.—One of the first and noblest of human sciences, a science which does more to quicken and invigorate the human understanding than all other kinds of human learning put together: but it is not apt, except in persons very happily born, to open and liberalize the mind exactly in the same proportion.—[BURKE.]

posterity and the perpetual service of his country [f]," he was sensible he could not perform his resolution in a better and more effectual manner, than by extending to the youth of this place, those assistances of which he so well remembered and so heartily regretted the want. And the sense which the university has entertained of this ample and most useful benefaction, must appear, beyond a doubt, from their gratitude in receiving it with all possible marks of esteem [g]; from their alacrity and unexampled dispatch in carrying it into execution [h]; and, above all, from the laws and constitutions [12] by which they have effectually guarded it from the neglect and abuse to which such institutions are liable [i]. We have

[f] See the preface to the eighteenth volume of his abridgment.

[g] Mr. Viner is enrolled among the public benefactors of the university by decree of convocation.

[h] Mr. Viner died June 5, 1756. His effects were collected and settled, near a volume of his work printed, almost the whole disposed of, and the accounts made up in a year and a half from his decease, by the very diligent and worthy administrators with the will annexed, (Dr. West and Dr. Good of Magdalene, Dr. Whalley of Oriel, Mr. Buckler of All Souls, and Mr. Betts of University college), to whom that care was consigned by the university. Another half year was employed in considering and settling a plan of the proposed institution, and in framing the statutes thereupon, which were finally confirmed by convocation on the 3d of July, 1758. The professor was elected on the 20th of October following, and two scholars on the succeeding day. And, lastly, it was agreed at the annual audit in 1761, to establish a fellowship; and a fellow was accordingly elected in January following.—The residue of this fund, arising from the sale of Mr. Viner's abridgment, will probably be sufficient hereafter to found another fellowship and scholarship, or three more scholarships, as shall be thought most expedient.

[i] The statutes are in substance as follows:

1. That the accounts of this bene-

(12) This foundation was still further regulated by a statute passed in the year 1809, reducing the number of lectures to be read by the professor from forty to twenty-four, entirely dispensing with the residence of the fellows, and reducing the period of residence of the scholars, but enforcing their attendance at the lectures, and lastly, throwing the lectures open to all members of the university.

A similar benefit was conferred on the university of Cambridge by the will of Sir George Downing, who died in the year 1749. The will bore date in the year 1717, and contained a devise of certain real estates therein mentioned, situate in the counties of Cambridge, Bedford and Suffolk, subject to certain prior limitations, to certain trustees, all of whom died in the testator's lifetime, upon trust to found and endow a college within the university of Cambridge, to be called "Downing College," wherein should be professed and taught such useful learning as the said trustees, with the approbation of the archbishops of Canterbury and York, and the masters of St. John's College and Clare Hall, in the university of Cambridge, in being at the time of the foundation of the

seen an universal emulation, who best should understand, or most faithfully pursue, the designs of our generous patron: [29]

faction be separately kept, and annually audited by the delegates of accounts and professor, and afterwards reported to convocation.

2. That a professorship of the laws of England be established, with a salary of two hundred pounds *per annum*; the professor to be elected by convocation, and to be at the time of his election at least a master of arts or bachelor of civil law in the university of Oxford, of ten years standing from his matriculation; and also a barrister-at-law of four years standing at the bar.

3. That such professor (by himself, or by deputy to be previously approved by convocation) do read one solemn public lecture on the laws of England, and in the English language, in every academical term, at certain stated times previous to the commencement of the common law term; or forfeit twenty pounds for every omission to Mr. Viner's general fund; and also (by himself, or by deputy to be approved, if occasional, by the vice-chancellor and proctors; or, if permanent, both the cause and the deputy to be annually approved by convocation) do yearly read one complete course of lectures on the laws of England, and in the English language, consisting of sixty lectures at the least; to be read during the university term time, with such proper intervals that not more than four lectures may fall within any single week: that the professor do give a month's notice of the time when the course is to begin, and to read *gratis* to the scholars of Mr. Viner's foundation; but may demand of other auditors such gratuity as shall be settled from time to time by decree of convocation; and that for every of the said sixty lectures omitted, the professor, on complaint made to the vice-chancellor within the year, do forfeit forty shillings to Mr. Viner's general fund; the proof of having performed his duty to lie upon the said professor.

4. That every professor do continue in his office during life, unless in case of such misbehaviour as shall amount

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college, should direct and prescribe. In 1764, the prior limitations having determined, an information was filed for the purpose of having the said trusts carried into execution, but it was not until the year 1800 that the said trusts were established and a decree made for carrying them into execution. (3 Ves. 714.) Lands having been purchased, and a scheme for the foundation of the intended college having been approved of by the said archbishops and masters and by the lord chancellor, a charter was granted on the 22nd September, 1800, for its erection and incorporation. The college was ordained to consist of one master, a professor of law and a professor of medicine, and sixteen fellows, fourteen of whom should be laymen, and of such a number of scholars as should be thereafter fixed, but at present its funds have not justified the appointment of the full complement either of fellows and scholars.

The charter contains various provisions for enforcing the reading of lectures on law and physic by the professors, entirely exempts the lay fellows from residence, "their stipends being only designed as a temporary assistance to those who are in the active pursuit of the professions of law and physic, which professions confine the attention and fix the residence of their members at a distance from the university," and grants all the necessary powers for the good government, regulation, and management of the foundation, its officers and revenues; not so accurately however as to prevent the necessity of another application to the Court of Chancery in the year 1837. (2 Myl. & Cr. 642.)

[30] and with pleasure we recollect, that those who are most distinguished by their quality, their fortune, their station,

to bannition by the university statutes; or unless he deserts the profession of the law by betaking himself to another profession; or unless after one admonition by the vice-chancellor and proctors for notorious neglect, he is guilty of another flagrant omission; in any of which cases he be deprived by the vice-chancellor, with consent of the house of convocation.

5. That such a number of fellowships with a stipend of fifty pounds *per annum*, and scholarship, with a stipend of thirty pounds, be established, as the convocation shall from time to time ordain, according to the state of Mr. Viner's revenues.

6. That every fellow be elected by convocation, and at the time of election be unmarried, and at least a master of arts or bachelor of civil law, and a member of some college or hall in the university of Oxford; the scholars of this foundation, or such as have been scholars (if qualified and approved of by convocation), to have the preference: that, if not a barrister when chosen, he be called to the bar within one year after his election; but do reside in the university two months in every year, or in case of non-residence do forfeit the stipend of that year to Mr. Viner's general fund.

7. That every scholar be elected by convocation, and at the time of election be unmarried, and a member of some college or hall in the university of Oxford, who shall have been matriculated twenty-four calendar months at the least; that he do take the degree of bachelor of civil law with all convenient speed (either proceeding in arts or otherwise); and previous to his taking the same, between the second and eighth year from his matriculation, be bound to attend two courses of the professor's lectures, to be certified under the professor's hand; and within one year after taking the same be called to the bar; that he do annually reside six months till he is of four years' standing, and four months from that time till he is master of arts or bachelor of civil law; after which he be bound to reside two months in every year; or, in case of non-residence, do forfeit the stipend of that year to Mr. Viner's general fund.

8. That the scholarships do become void in case of non-attendance on the professor, or not taking the degree of bachelor of civil law, being duly admonished so to do by the vice-chancellor and proctors; and that both fellowships and scholarships do expire at the end of ten years after each respective election; and become void in case of gross misbehaviour, non-residence for two years together, marriage, not being called to the bar within the time before limited, (being duly admonished so to be by the vice-chancellor and proctors), or deserting the profession of the law by following any other profession: and that in any of these cases the vice-chancellor, with consent of convocation, do declare the place actually void.

9. That in case of any vacancy of the professorship, fellowships, or scholarships, the profits of the current year be rateably divided between the predecessor, or his representatives, and the successor; and that a new election be had within one month afterwards, unless by that means the time of election

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In London, professors of eminence deliver lectures on the laws of England both at King's College and University College, attendance at which, when combined with diligent attention to the other sources of legal instruction, the student will find of the most invaluable service to him.

their learning, or their experience, have appeared the most zealous to promote the success of Mr. Viner's establishment.

The advantages that might result to the science of the law itself, when a little more attended to in the seats of knowledge, perhaps would be very considerable. The leisure and abilities of the learned in these retirements might either suggest expedients, or execute those dictated by wiser heads[k], for improving its method, retrenching its superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system; a task, which those, who are deeply employed in business and the more active scenes of the profession, can hardly condescend to engage in. And as to the interest, or (which is the same) the reputation of the universities themselves, I may venture to pronounce, that if ever this study should arrive to any tolerable perfection either here or at Cambridge, the nobility and gentry of this kingdom would not shorten their residence upon this account, nor perhaps entertain a worse opinion of the benefits of academical education. Neither should it be considered as a matter of light importance, that while we thus extend the *pomœria* of university learning, and adopt a new tribe of citizens within these philosophical walls, we interest a very numerous and very powerful profession in the preservation of our rights and revenues. [31]

The advantages of this study to the universities.

For I think it past dispute that those gentlemen, who resort to the inns of court with a view to pursue the profession, will find it expedient (whenever it is practicable) to lay the previous foundations of this, as well as every other science, in one of our learned universities. We may appeal to the experience of every sensible lawyer, whether any thing can be more hazardous or discouraging than the usual entrance on the study of the law. A raw and unexperienced youth, in the most dangerous season of life, is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can

On the mode of commencing it.

shall fall within any vacation, in which case it be deferred to the first week in the next full term. And that before any convocation shall be held for such election, or for any other matter relating to Mr. Viner's benefaction, ten days' public notice be given to each college and hall of the convocation, and the cause of convoking it.

[k] See Lord Bacon's proposals and offer of a digest.

suggest; with no public direction in what course to pursue his inquiries; no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning; or else by an assiduous attendance on the courts to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little therefore is it to be wondered at that we hear of so frequent miscarriages; that so many gentlemen of bright imaginations grow weary of so unpromising a search[1], and addict themselves wholly to amusements, or other less innocent pursuits; and that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives!

The evident want of some assistance in the rudiments of legal knowledge has given birth to a practice, which, if ever it had grown to be general, must have proved of extremely
[32] pernicious consequence. I mean the custom by some so very warmly recommended, of dropping all liberal education, as of no use to students in the law: and placing them, in its stead, at the desk of some skilful attorney; in order to initiate them early in all the depths of practice, and render them more dexterous in the mechanical part of business. A few instances of particular persons (men of excellent learning and unblemished integrity), who, in spite of this method of education, have shone in the foremost ranks of the bar, have afforded some kind of sanction to this illiberal path to the profession, and biassed many parents, of short-sighted judgment, in its favour: not considering that there are some geniuses, formed to overcome all disadvantages, and that from such particular instances no general rules can be formed; nor observing, that those very persons have frequently recommended, by the most forcible of all examples, the disposal of their own offspring, a very different foundation

[1] Sir Henry Spelman, in the preface to his glossary, gives us a very lively picture of his own distress upon this occasion. "*Emisit me mater Londinum, juris nostri capessendi gratia: cujus cum vestibulum salutassem, reperissemque linguam peregrinam, dialectum barbarum, methodum inconcinnum, molem non ingentem solum sed perpetuis humeris sustinendam, excidit mihi (fateor) animus*," &c.

of legal studies, a regular academical education. Perhaps too, in return, I could now direct their eyes to our principal seats of justice, and suggest a few hints in favour of university learning [m]:—but in these all who hear me, I know, have already prevented me.

Previous education.

Making therefore due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer thus educated to the bar, in subservience to attornies and solicitors [n], will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know; if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* [o] is the utmost his knowledge will arrive at: he must never aspire to form, and seldom expect to comprehend, any arguments drawn *à priori*, from the spirit of the laws, and the natural foundations of justice.

[33]

Nor is this all; for (as few persons of birth or fortune, or even of scholastic education, will submit to the drudgery of servitude, and the manual labour of copying the trash of an office), should this infatuation prevail to any considerable degree, we must rarely expect to see a gentleman of distinction or learning at the bar. And what the consequence may be, to have the interpretation and enforcement of the laws (which include the entire disposal of our properties, liberties, and lives) fall wholly into the hands of obscure or illiterate men, is matter of very public concern.

The inconveniences here pointed out can never be effectually prevented, but by making academical education a previous step to the profession of the common law, and at the same time making the rudiments of the law a part of

[m] The four highest judicial offices were at that time filled by gentlemen, two of whom had been fellows of All Souls College; another, student of Christ Church; and the fourth, a fellow of Trinity College, Cambridge [13].

[n] See Kennet's Life of Somner, p. 67.

[o] Ff. 40. 9. 12.

(13) The first was Lord Chancellor Nottingham; the second, Chief Justice Willes, (C. P.); the third, Lord Chief Justice Mansfield, (Q. B.); and the fourth, Sir Thomas Clarke, Master of the Rolls.

academical education. For sciences are of a sociable disposition, and flourish best in the neighbourhood of each other: nor is there any branch of learning but may be helped and improved by assistances drawn from other arts. If, therefore, the student in our laws hath formed both his sentiments and style, by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through any the most intricate deduction, by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine experimental philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this or any part of it (though all may be easily done under as able instructors as ever graced any seats of learning), a student thus qualified may enter upon the study of the law with incredible advantage and reputation [14]. And if, at the conclusion, or during the acquisition of these
[34] accomplishments, he will afford himself here a year or two's farther leisure, to lay the foundation of his future labours in a solid scientifical method, without thirsting too early to attend that practice which it was impossible he should rightly comprehend, he will afterwards proceed with the

(14) The eloquent Curran, in one of his most brilliant speeches (29 St. Tr. 243) alludes with deep feeling to the philosophic communion he had enjoyed while engaged in the study of the law, with Lord Avonmore and others; who met together "to feed the youthful vigour of their studious minds with the theoretic knowledge of the wisest philosophers and statesmen, and to refine that theory into the quick and exquisite sensibility of moral instinct, by contemplating the practice of the most illustrious examples of ancient Greece and Rome; thus, while the horizon of the board became expanded into the horizon of man, and the swelling hearts of all conceived and communicated the generous purpose, the slenderer and younger tapers imbibed borrowed light from the redundant fountains of the more matured." When the study of laws, such as ours, is mingled with pursuits such as these, who need wonder that from the ranks of this profession have sprung the wisest of England's statesmen, the noblest of her patriots, and the best of her citizens?

greatest ease, and will unfold the most intricate points with an intuitive rapidity and clearness.

I shall not insist upon such motives as might be drawn from principles of economy, and are applicable to particulars only: I reason upon more general topics. And therefore to the qualities of the head, which I have just enumerated, I cannot but add those of the heart; affectionate loyalty to the king, a zeal for liberty and the constitution, a sense of real honour, and well-grounded principles of religion; as necessary to form a truly valuable English lawyer, a Hyde, a Hale, or a Talbot. And, whatever the ignorance of some, or unkindness of others, may have heretofore untruly suggested, experience will warrant us to affirm, that these endowments of loyalty and public spirit, of honour and religion, are no where to be found in more high perfection than in the two universities of this kingdom.

Plan of the Commentaries.

Before I conclude, it may perhaps be expected, that I lay before you a short and general account of the method I propose to follow, in endeavouring to execute the trust you have been pleased to repose in my hands. And in these solemn lectures, which are ordained to be read at the entrance of every term (more perhaps to do public honour to this laudable institution, than for the private instruction of individuals [p]), I presume it will best answer the intent of our benefactor and the expectation of this learned body, if I attempt to illustrate at times such detached titles of the law, as are the most easy to be understood, and most capable of historical or critical ornament. But in reading the complete course, which is annually consigned to my care, a more regular method will be necessary; and till a better is proposed, I shall take the liberty to follow the same that I have already submitted to the public [q]. To fill up and finish that outline with propriety and correctness, and to render the whole intelligible to the uninformed minds of beginners, (whom we are too apt to suppose acquainted with terms and ideas which they never had opportunity to learn), this must

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[p] See Lowth's Oratio Crewiana, p. 365.

[q] The analysis of the laws of England, first published A.D. 1756, and exhibiting the order and principal divisions of the ensuing Commentaries, which were originally submitted to the university in a private course of lectures, A.D. 1753.

be my ardent endeavour, though by no means my promise, to accomplish. You will permit me, however, very briefly to describe, rather what I conceive an academical expounder of the laws should do, than what I have ever known to be done.

He should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities; it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. His attention should be engaged, like that of the readers in Fortescue's inns of chancery, "in tracing out the originals, and, as it were, the elements of the law." For if, as Justinian[r] has observed, the tender understanding of the student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies, or will carry him heavily through them, with much labour, delay, and despondence. These originals should be traced to their fountains, as well as our distance will permit; to the customs of the Britons and Germans, as recorded by Cæsar and Tacitus; to the codes of the northern nations on the continent, and more especially to those of our own Saxon princes; to the rules of the Roman law either left here in the days of Papinian, or imported by Vacarius and his followers: but
[36] above all, to that inexhaustible reservoir of legal antiquities and learning, the feodal law, or, as Spelman[s] has entitled it, the law of nations in our western orb. These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions observed, and it should be shewn how far they are connected with, or have at any time been affected by, the civil transactions of the kingdom.

[r] *Incipientibus nobis exponere jura populi Romani, ita videntur tradi posse commodissime, si primo levi ac simplici via singula tradantur; alioqui, si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneravimus, duorum alterum, aut desertorem studiorum efficiemus, aut cum magno labore, sæpe etiam cum diffidentia (quæ plerumque juvenes avertit), serius ad id perducemus, ad quod, leviore via ductus, sine magno labore, et sine ulla diffidentia maturius perduci potuisset.* Inst. l. 1. 2.

[s] Of parliaments, 57.

A plan of this nature, if executed with care and ability, cannot fail of administering a most useful and rational entertainment to students of all ranks and professions; and yet it must be confessed that the study of the laws is not merely a matter of amusement: for as a very judicious writer[t] has observed upon a similar occasion, the learner "will be considerably disappointed, if he looks for entertainment without the expense of attention." An attention, however, not greater than is usually bestowed in mastering the rudiments of other sciences, or sometimes in pursuing a favourite recreation or exercise. And this attention is not equally necessary to be exerted by every student upon every occasion. Some branches of the law, as the formal process of civil suits, and the subtile distinctions incident to landed property, which are the most difficult to be thoroughly understood, are the least worth the pains of understanding, except to such gentlemen as intend to pursue the profession. To others I may venture to apply, with a slight alteration, the words of sir John Fortescue[u], when first his royal pupil determines to engage in this study. "It will not be necessary for a gentleman, as such, to examine with a close application the critical niceties of the law. It will fully be sufficient, and he may well enough be denominated a lawyer, if under the instruction of a master he traces up the principles and grounds of the law, even to their original elements. Therefore in a very short period, and with very little labour, he [37] may be sufficiently informed in the laws of his country, if he will but apply his mind in good earnest to receive and apprehend them. For though such knowledge as is necessary for a judge is hardly to be acquired by the lucubrations of twenty years, yet with a genius of tolerable perspicacity, that

[t] Dr. Taylor's pref. to Elem. of Civil Law.

[u] "*Tibi, princeps, necesse non erit mysteria legis Angliæ longo disciplinatu rimare. Sufficiet tibi,*—et satis *denominari legista mereberis, si legum principia et causas, usque ad elementa, discipuli more indagaveris. Quare tu, princeps serenissime, parvo tempore, parva industria, sufficienter eris in legibus regni Angliæ eruditus, dummodo ad ejus apprehensionem tu conferas animum tuum.—Nosco namque, ingenii tui perspicacitatem, quo audacter pronuntio quod in legibus illis (licet earum peritia, qualis judicibus necessaria est, vix viginti annorum lucubrationibus acquiratur) tu doctrinam principi congruam in anno uno sufficienter nancisseris; nec interim militarem disciplinam, ad quam tam ardenter anhelas, negliges; sed ea, recreationis loco, etiam anno illo tu ad libitum perfrueris.* De laud. Leg. Ang. c. 8.

knowledge which is fit for a person of birth or condition, may be learned in a single year, without neglecting his other improvements."

To the few therefore (the very few I am persuaded) that entertain such unworthy notions of an university, as to suppose it intended for mere dissipation of thought; to such as mean only to while away the awkward interval from childhood to twenty-one, between the restraints of the school and the licentiousness of politer life, in a calm middle state of mental and of moral inactivity; to these Mr. Viner gives no invitation to an entertainment which they never can relish. But to the long and illustrious train of noble and ingenuous youth, who are not more distinguished among us by their birth and possessions, than by the regularity of their conduct and their thirst after useful knowledge, to these our benefactor has consecrated the fruits of a long and laborious life, worn out in the duties of his calling; and will joyfully reflect (if such reflections can now be the employment of his thoughts) that he could not more effectually have benefited posterity, or contributed to the service of the public, than by founding an institution which may instruct the rising generation in the wisdom of our civil polity, and inform them with a desire to be still better acquainted with the laws and constitution of their country [15].

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(15) Mr. Chitty has inserted a long note of advice to law students, but, being addressed only to one class of the readers of Blackstone, it is omitted in this edition; and in its place may be suggested the attentive perusal of Mr. Warren's admirable Introduction to Law Studies.

SECTION II.

OF THE NATURE OF LAWS IN GENERAL.

Signification of "Law."

LAW, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey.

Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform. And to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes, at his own pleasure, certain arbitrary laws for its direction; as that the hand shall describe a given space in a given time; to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws; more numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again;—the method of animal nutrition, digestion, secretion, and all other branches of vital economy;—are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great Creator.

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This then is the general signification of law, a rule of action dictated by some superior being; and in those creatures that have neither the power to think nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free-will, is commanded to make use of those faculties in the general regulation of his behaviour.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct; not indeed in every particular, but in all those points wherein his dependence consists. This principle therefore has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less absolute or limited. And consequently, as man depends absolutely upon his Maker for every thing, it is necessary that he should in all points conform to his Maker's will.

Law of nature.

This will of his Maker is called the law of nature [1]. For as God, when he created matter, and endued it with a prin-

(1) "The Law of Nature" is a supreme, invariable, and uncontrollable rule of conduct to all men; and it is so called, because its general precepts are essentially adapted to promote the happiness of man, as long as he remains a being of the same nature with which he is at present endowed, or, in other words, as long as he continues to be man, in all the variety of times, places, and circumstances in which he has been known, or can be imagined to exist; because, it is discoverable by natural reason, and suitable to our own natural constitution; because its fitness and wisdom are founded on the general nature of human beings, and not on any of those temporary and accidental situations in which they may be placed; and, lastly, because its violation is avenged by natural punishments, which necessarily flow from the constitution of things, and are as fixed and inevitable as the order of nature, as by shame, remorse, infamy and misery, and still further enforced by the reasonable expectation of still more awful penalties in a future and more permanent state of existence.—[MACKINTOSH.]

ciple of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free-will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws. [40]

Considering the Creator only as a being of infinite *power*, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as he is also a being of infinite *wisdom*, he has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the Creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian[a] has reduced the whole doctrine of law.

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance, its inseparable companion. As therefore the Creator is a being, not only of infinite *power* and *wisdom*, but also of infinite *goodness*, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former: and, if the former be punctually obeyed, it cannot but induce the latter. In con-

[a] *Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere.* Inst. I. 1. 3.

sequence of which mutual connexion of justice and human
[41] felicity, he has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems amount to no more than demonstrating, that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.

This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original [2].

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason: whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life; by considering what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this.

(2) *Est quidem vera lex recta ratio, naturæ congruens, diffusa in omnes, constans, sempiterna, quæ vocet ad officium jubendo, vetando a fraude deterreat, quæ tamen neque probos frustra jubet aut vetat, neque improbos jubendo aut vetando movet. Huic legi neque obrogari fas est neque derogari ex hac aliquid licet neque tota abrogari potest. Nec vero aut per senatum aut per populum solvi hac lege possumus. Neque est quærendus explanator aut interpres ejus alius. Nec erit alia lex Romæ, alia Athenis, alia nunc alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit; unusque erit communis quasi magister et imperator omnium Deus; ille legis hujus inventor, disceptator, lator, cui qui non parebit ipse se fugiet et naturam hominis aspernatur, atque hoc ipso luet maximas pœnas etiamsi cætera supplicia quæ putantur effugerit.* Cic. De Rep. lib. iii.

But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

Revealed law of God.

This has given manifold occasion for the benign interposition of Divine Providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, [42] hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the Holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law. Because one is the law of nature expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority: but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true un-

lawfulness of this crime. Those human laws that annex a punishment to it, do not at all increase its moral guilt, or
[43] superadd any fresh obligation *in foro conscientiæ* to abstain from its perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine [3]. But with regard to matters that are in themselves

(3) That we are bound to disobey every human law which allows or enjoins us to commit a breach of the law of nature, will appear indisputable if we reflect, that, (according to Sir James Mackintosh's excellent definition of the Law of Nature,) a law contradictory thereto would promote, and, if obeyed, must ever promote the misery of man so long as he remains a being of the same nature with which he is at present endowed; is undiscoverable by natural reason, and unsuitable to our natural constitution; and obedience to which would be avenged by natural punishments, and by the yet more awful penalties of a future state. It would be too absurd for the most strenuous advocate of passive obedience and non-resistance to contend, that any rule prescribed by the supreme power in a state, having these characteristics, ought to be obeyed by any rational or responsible being.

On this doctrine depends the "lawfulness" of the Revolution of 1688. (*Sacheverell's case*, 15 St. Tr.). "The municipal laws of a country," said Stanhope, "are only made for the common course of things, and can never be understood to have been designed to defeat the end of all laws whatever, which would be the consequence of a nation's submitting to a violation of all their divine and human rights." The language of the other members of the House of Commons in that celebrated case, is still stronger upon this point.—"If the transgressions of any given law against common right and the ends of just government be considerable in their nature and spreading in their effects, as this objection goes to the root and principle of the law, it renders it void in its obligatory quality on the mind. It cannot be said to have the properties of genuine law, even in its imperfections and defects. Such a law, though made not virtually, but actually, by the people, not representatively, but even collectively, would be null and void; because it would be against the principle of a superior law, while it is not in the power of any community, or of the whole race of man to alter. I mean the will of Him, who gave us our nature, and in giving, impressed an invariable law upon it." (BURKE, Tracts on the Popery Laws). Nor do episcopal ethics always inculcate passive obedience and non-resistance. In the debate on the Church Discipline Bill, (July 26, 1838) the Bishop of Exeter said: "I speak advisedly, but I speak not in a spirit of defiance, when I say, that should this bill pass, I shall not feel myself at liberty to obey its main instructions or directions. To other laws, I will cheerfully conform, but this will be a law that will strike at the very root of the essential discipline of our christian church. I plainly and openly then declare, that, should this bill pass, if a clergyman in my diocese conducts himself criminally, I shall call on that clergyman to answer to me for his actions, and if he will not obey my remonstrances, I shall proceed to that sentence which this bill tells me I shall not pass,—I shall proceed to excommunicate him." (Mir. of Parl.) Mr. Justice Coleridge (note 2, p. 41.) understands Blackstone to mean

indifferent, and are not commanded or forbidden by those superior laws; such for instance, as exporting of wool into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

Law of nations.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature, and the law of God. Neither could any other law possibly exist: for a law always supposes some superior who is to make it; and in a state of nature we are all equal, without any superior but Him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject [b], is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called "the law of nations:" which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts, we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject, and therefore the civil law [c] very justly ob-

[b] Puffendorff, l. 7. c. 1, compared with Barbeyrac's commentary.

[c] Ff. 1. 1. 9.

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merely, that a human law against the law of nature has no binding force on the conscience; and that, if a man submits to the penalty of disobedience, he stands acquitted. It seems to the present editor, that laws which are void *in se* must be void *in toto*; and, consequently, that we are not bound to pay any penalties which are annexed to the breach of them. Moreover, the legislature might declare death to be the penalty of a breach of such laws, as in the instances cited above; and thus be able to annihilate the power, though unable to take away the right of resistance.

"The practical conclusion is, that disobedience is always presumptively wrong in morals, though it may be justifiable in the one case supposed of a contradiction between divine and human laws; but that it stands in all cases upon the serious responsibility of the party disobeying."—[COLERIDGE.]

serves, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium* [4].

[44]
Municipal law.

Thus much I thought necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian [d], "*jus civile est quod quisque sibi populus constituit.*" I call it *municipal* law, in compliance with common speech; for though, strictly, that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.

Definition of municipal law.

Municipal law [5], thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." Let us endeavour to explain its several properties, as they arise out of this definition.

[d] Inst. 1. 2. 1.

(4) The law of nations corresponds in its topics more nearly with the *jus feciale*, than with the *jus gentium*, of the Romans; the latter is rather what we call the law of nature. The rights and duties of nations *inter se* seem to have been the subject of very little consideration with that people, and not much more regarded among the Greeks. The latter seem, however, to have had certain well recognised rules upon some of its topics, more especially with regard to the burial of the slain in battle, the erection of trophies, and the privileges of sanctuary. The first and fifth books of Thucydides contain many traces of express rules on the rights of ambassadors; and the title of Aristotle's lost treatise on the rights of war (δικαιωματα πολεμου) would even seem to indicate something of a complete and comprehensive system.

The law of nations, or "international law," as this branch of jurisprudence is more correctly designated, (BENTH. Mor. and Leg. vol. 2) comprehends the principles of national independence, the intercourse of nations in peace, the privileges of ambassadors, consuls, and inferior ministers; the commerce of the subjects of each state with those of the others; the grounds of first war, and the modes of conducting it; the mutual duties of belligerent and neutral powers; the limits of lawful hostility; the rights of conquest; the faith to be observed in warfare; the force of an armistice, of safe conducts and passports; the nature and obligation of alliances; the means of negotiation, and the authority and interpretation of treaties. Its rules are deduced from the natural law of equity, from the approved usage of civilized nations, and from the adjudications of international tribunals.

(5) There is no single word in the English language which will include every prescribed rule of civil conduct *dehors* the law of nature and the revealed will of God. The Greek word *νομος* most nearly has this signification.

And, first, it is a *rule:* not a transient sudden order from a superior, to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Tititus is accused shall be deemed high treason; this has permanency, uniformity, and unversality, and therefore is properly a *rule.* It is also called a *rule,* to distinguish it from *advice* or *counsel,* which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the *law* depends not upon *our approbation,* but upon the *maker's will.* Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

On the first branch of the definition of municipal law. It is "a rule"

It is also called a *rule,* to distinguish it from a *compact* or *agreement,* for a compact is a promise proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising any thing at all. Upon these accounts law is defined to be "*a rule.*" [45]

Municipal law is also "a rule *of civil conduct.*" This distinguishes municipal law from the natural or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour than those of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more, than that he do

of civil conduct"

contribute, on his part, to the subsistence and peace of the society.

"prescribed" It is likewise "a rule *prescribed.*" Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified, *vivâ voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed [46] to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto;* when after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust [e]. All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed.*" But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he *might*

[e] Such laws among the Romans were denominated *privilegia*, or private laws, of which Cicero (de leg. 3. 19, and in his oration pro domo, 17.) thus speaks: "*Vetant leges sacratæ, vetant duodecim tabulæ, leges privatis hominibus irrogari; id enim est privilegium. Nemo unquam tulit: nihil est crudelius, nihil perniciosius, nihil quod minus hæc civitas ferre possit.*"

know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity [6].

"by the supreme power."

But, farther: municipal law is "a rule of civil conduct prescribed *by the supreme power in a state.*" For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

[47]

This may lead us into a short inquiry concerning the nature of society and civil government; and the natural, inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

Origin and nature of society.

The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society, either natural or civil; but that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted; and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society, among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it neces-

(6) A session of parliament (like a session of the peace, 1 M. & S. 481), being considered as one day in law, to whatever period it might be extended in fact, statutes, in which no day was fixed for their commencement, were held to take effect from the first day of the session in which they passed. (4 Inst. 25). Many statutes were consequently *ex post facto* laws. By 33 Geo. 3, c. 13, this legal fiction was abolished, and it was enacted that acts of parliament, in which no specific day was fixed for their commencement, should take effect from the date of the day on which they received the royal assent, which date the clerk of the parliament must indorse on every act of parliament at the time.

sarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together, that demonstrates the necessity of this union, and that therefore is the solid and natural foundation, as well as the cement, of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied,
[48] in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.

Origin and object of government.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be intrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of Him who is emphatically styled the Supreme Being; the three grand requisites,

I mean, of wisdom, of goodness, and of power: wisdom to discern the real interest of the community; goodness to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well-constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or by what right soever they subsist, there is and must be [49] in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summa imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation), the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

Three forms of government.

The political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly, consisting of all the free members of a community which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy; the last, when it is intrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

Advantages and disadvantages of each.

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always
[50] a degree of patriotism or public spirit. In aristocracies there is more wisdom to be found than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is, indeed, the most powerful of any; for by the entire conjunction of the legislative and executive powers, all the sinews of government are knit together, and united in the hand of the prince; but then there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of the law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero [f] declares himself of opinion, "*esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, sit modicè confusa;*" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure [g].

Wherein resides the supreme power of the British constitution.

But, happily for us of this island, the British constitution [7] has long remained, and I trust will long continue, a standing

[f] In his fragments De Rep. l. 1, c. 29 and c. 45.

[g] "*Cunctas nationes et urbes, populus, aut primores, aut singuli regunt: delecta ex his et constituta reipublicæ forma laudari faciliùs quam evenire, vel, si evenit, haud diuturna esse potest.*" Ann. l. 4, c. 33.

(7) The constitution of a country may be defined to be the peculiar arrangements and limitations of the executive, legislative and judicial powers of its government, which are embodied in its original institutions as modified by its existing laws. (DR. ARNOLD'S Inaugural Lecture).

The reader need scarcely be reminded that Blackstone's theory, (that a balance of power among three independent forces forms an essential charac-

exception to the truth of this observation. For, as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is intrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and [51] thirdly, the house of commons, freely chosen by the people from among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principal ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches: for instance, in the king and house of lords, our laws might be providently made, and well executed, but they might not have always the good of the people in view: if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive

teristic of the British legislature), has been vehemently disputed by various political writers. The discussion of such a question, however, is not of a nature to be admitted into these notes.

power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be
[52] an end of our constitution. The legislature would be changed from that, which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society: and such a change, however effected, is according to Mr. Locke[h] (who perhaps carries his theory too far) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.

The right of the supreme power to make laws.

Having thus cursorily considered the three usual species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action.* And this may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural* union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political* union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is intrusted: and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law.*

[h] On government, part 2, § 212.

Thus far as to the *right* of the supreme power to make laws; but farther, it is its *duty* likewise. For, since the respective members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of that its will. But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity.

The duty to make laws.

[53]

From what has been advanced, the truth of the former branch of our definition is (I trust) sufficiently evident; that "*municipal law is a rule of civil conduct prescribed by the supreme power in a state.*" I proceed now to the latter branch of it; that it is a rule so prescribed, "*commanding what is right, and prohibiting what is wrong.*"

On the second branch of the definition of municipal law.

Now, in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights, and to restrain or redress these wrongs. It remains, therefore, only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

For this purpose every law may be said to consist of several parts: one, *declaratory;* whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down: another, *directory;* whereby the subject is instructed and conjoined to observe those rights, and to abstain from the commission of those wrongs: a third, *remedial;* whereby a method is pointed out to recover a man's private rights, or

Every law should be declaratory, directory, remedial, and vindicatory.

[54]

redress his private wrongs: to which may be added a fourth, usually termed the *sanction*, or *vindicatory* branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

Declaratory. With regard to the first of these, the *declaratory* part of the municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemesnors, that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great Lawgiver, transcribing and publishing His precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.

[55] But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemesnors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offence: yet that right and

this offence have no foundation in nature; but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide, in what cases the seizing another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the *declaratory* part of the municipal law: Directory.
and the *directory* stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen[i] that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

The *remedial* part of the law is so necessary a consequence Remedial.
of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in [56]
vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the *declaratory* part of the law has said, "that the field or inheritance, which belonged to Titius's father, is vested by his death in Titius:" and the *directory* part has "forbidden any one to enter on another's property, without the leave of the owner:" if Gaius, after this, will presume to take possession of the land, the *remedial* part of the law will then interpose its office; will make Gaius restore the possession to Titius, "
and also pay him damages for the invasion.

With regard to the *sanction* of laws, or the evil that may Vindicatory.
attend the breach of public duties; it is observed, that human legislators have for the most part chosen to make the sanction

[i] Supra, page 43.

of their laws rather *vindicatory* than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human action than the prospect of good [k]. For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are intrusted with the care of putting the laws in execution.

[57] Of all the parts of a law the most effectual is the *vindicatory*. For it is but lost labour to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

Legislators and their laws are said to *compel* and *oblige;* not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation; but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty: for rewards, in their nature, can only *persuade* and *allure;* nothing is *compulsory* but punishment.

It is true it hath been holden, and very justly, by the

[k] Locke, Hum. Und. b. 2, c. 21.

What municipal laws bind the conscience.

principal of our ethical writers, that human laws are binding upon men's consciences. But if that were the only or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance. And, true as this principle is, it must still be understood with some restriction. It holds, I apprehend, as to *rights;* and that, when the law has determined the field to belong to Titius, it is matter of conscience no longer to withhold or to invade it. So also in regard to *natural duties,* and such offences as are *mala in se:* here we are bound in conscience, because we are bound by superior laws, before those human laws were in being, to perform the one, and abstain from the other. But in relation to those laws which enjoin only *positive duties,* and forbid only such things as are not *mala in se,* but *mala prohibita* merely, without any intermixture of moral guilt, annexing a penalty to non-compliance [1], here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws, for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; "either abstain from this, or submit to such a penalty;" and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. Thus, by the statutes for preserving game, a penalty is denounced against every unqualified person that kills a hare, and against every person who possesses a partridge in August. And so, too, by other statutes, pecuniary penalties are inflicted for exercising trades without serving an apprenticeship thereto, for not burying the dead in woollen [8], for not performing the statute-work on the public roads [9], and for innumerable other positive misdemesnors. Now, these prohibitory laws do not make the transgression a moral offence, or sin: the only obligation in conscience is to submit to the

[58]

[1] See Vol. 2, page 420.

(8) These penalties were respectively removed by 54 Geo. 3, c. 96, and c. 108.

(9) The performance of statute labour has been since modified by 34 Geo. 3, c. 74; 44 Geo. 3, c. 52; 54 Geo. 3, c. 109; 3 Geo. 4, c. 126, s. 104; 4 Geo. 4, c. 95, ss. 79—82.

penalty, if levied. It must however be observed, that we are here speaking of laws that are simply and purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offence. But, where disobedience to the law involves in it also any degree of public mischief or private injury, there it falls within our former distinction, and is also an offence against conscience [m] [10].

I have now gone through the definition laid down of a municipal law: and have shown that it is "a rule—of civil conduct—prescribed—by the supreme power in a state—
[59] "commanding what is right, and prohibiting what is wrong:" in the explication of which I have endeavoured to interweave a few useful principles concerning the nature of civil government, and the obligation of human laws. Before I conclude this section, it may not be amiss to add a few observations concerning the *interpretation* of laws.

On the interpretation of laws.

When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad

[m] *Lex pure pœnalis tantum obligat ad pœnam, non item ad culpam: lex pœnalis mixta et ad culpam obligat, et ad pœnam.* Sanderson de conscient. obligat. prael. viii. § 17, 24.

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(10) Every ethical system, recognizing the Scriptures as authorities, must reject Blackstone's doctrine. Mr. Christian, Mr. Justice Coleridge, and other editors have successively pointed out its logical fallacies; and it has never, I believe, been judicially mentioned except with disapprobation. (See 2 B. & P. 375; 5 B. & Al. 341.)

Blackstone's difficulty, (that the multitude of penal laws relating to things merely *mala prohibita* would render them a snare for the conscience), if it is to be bound by them, has been long surmounted in the university of Cambridge by a very casuistical contrivance. An oath has always been required of every person, becoming a member of that body, that he will obey the lawful commands of the chancellor, vice-chancellor, &c.; observe all the laws, statutes, &c., of the university; promote piety and literature, and defend the honour and dignity of the university. But as the laws prescribe all the minutiæ of college discipline, as well as forbid many things *mala in se*, the consciences of the members of the university were, in the year 1647, relieved by a decree that the oaths of admission should be henceforth taken subject to the following cautela: "*Senatus Cantabrigiensis decrevit et declaravit eos omnes, qui monitionibus, correctionibus, mulctis et pœnis statutorum, legum, decretorum, ordinationum, injunctionum, et laudabilium consuetudinum hujus academiæ transgressoribus quovis modo incumbentibus humiliter se submiserint, nec esse nec habendos esse perjurii reos.*"

method of interpretation. To interrogate the legislature to decide particular disputes, is not only endless, but affords great room for partiality and oppression. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished, by every rational civilian, from those general constitutions which had only the nature of things for their guide. The emperor Macrinus, as his historian Capitolinus informs us, had once resolved to abolish these rescripts, and retain only the general edicts: he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be reverenced as laws. But Justinian thought otherwise [n], and he has preserved them all. In like manner the canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions [11] at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of them all. Let us take a short view of them all.

The intention of the legislature must be gathered,

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf [o], which forbad a layman to *lay hands* on a priest, was adjudged to extend to him who had hurt a priest with a weapon. Again; terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science, So in the act of settlement, where the crown of England is limited "to the princess Sophia, and the heirs of her body, being protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words, "*heirs of*

1. from the words.

[60]

[n] Inst. i. 2, 6.

[o] L. of N. and N. 5, 12, 3.

(11) And, whenever the intention of the legislature can be indubitably ascertained, courts are bound to give it effect, whatever may be their opinion of its wisdom, and policy. (1 T. R. 314.)

her body," which in a legal sense comprise only certain of her lineal descendants [12].

2. In cases of ambiguity, from the context.

2. If words happen to be still dubious, we may establish their meaning from the *context;* with which it may be of singular use to compare a word or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is: and, when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony [13].

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(12) The most enlightened and experienced judges have often lamented that courts of justice have departed from the plain construction of the words of statutes. Thus in *Edrick's case* (5 Rep. 118 b.) the judges said "that they ought not to make any construction against the express letter of the statute; for nothing can so express the meaning of the makers of the act as their own direct words, for *index animi sermo.*" See also 10 East, 122. So Ashurst, J., said: "It is safer to adopt what the legislature have actually said, than to suppose what they meant to say," (1 T. R. 51); construing the words according to their nature and import, in the order in which they stand in the act of parliament, (6 B. & C. 717); and without any reference to the division into sections, (3 B. & C. 64). It has also been determined, that general words may be applied *reddendo singula singulis,* (4 B. & C. 209; 7 B. & C. 570);—that affirmative words do not take away common law remedies, (2 Inst. 200), or common law privileges, (2 Inst. 395);—that affirmative words are only directory unless they are peremptory, for example, that certain forms shall be followed; while on the other hand negative words make a statute imperative (Co. Lit. 115 a; 1 East, 72; 7 B. & C. 12; 8 B. & C. 34);—that words of permission shall be construed as obligatory, where the act directed to be done is for the public benefit or for the sake of justice. (Salk. 609; Vern. 153). In some cases words are restrained to the matters strictly within their meaning, by force of the maxim *expressio unius alterius est exclusio,* (5 East, 478; 3 T. R., 442); while in other cases they have been extended to include matters not within the express words, but *ejusdem generis;* upon the principle, that it is impossible to enumerate every case intended to be included, and that the legislature, by putting the strongest cases, showed that the lesser, *ejusdem generis,* should be included. (2 Inst. 256, st. West. 1, c. 46; 2 Inst. 322, st. Glouc. c. 11; and infra, p. 88).

(13) Under this rule we may, in the first place, call in the aid of the common law, as was resolved in *Heydon's case.* (3 Rep. 7, infra, p. 87).

In the second place, we may call in the aid of other statutes, upon the same

3. As to the *subject-matter*, words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain and other victual; but when we consider that the statute was made to repress the usurpations of the papal see, and that

3. the subject-matter.

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subject, or relating expressly to the same point; for if it is to be inferred that a code of statutes relating to the same subject was intended to be consistent in its spirit and policy, and harmonious in its several parts and provisions. Thus, if one statute prohibit certain acts, and another statute be afterwards made inflicting penalties on persons who do those acts, both must be construed together. (Plowd. 206; 1 Price, 182). So the stamp acts, (2 T. R. 609), the excise laws, (2 T. R. 504), &c., being respectively in pari materiâ, are to be taken together. And this rule even includes statutes which have expired or are not referred to in the other acts. (1 Burr. 447).

In the third place, we may call in the aid of other parts of the same statute, drawing the intention of the makers of an act ex visceribus actûs. Thus we may gather its general intention and objects from the preamble. "But," says Bacon, "though the intent and mind of the law may be sometimes drawn from the preambles, yet its latitude and extent should by no means be derived from them; for the preamble frequently fixes upon a few of the more plausible and special particulars by way of example, whilst the law contains many more; or, on the contrary, the law restrains and limits many things, the reason whereof it were not necessary to insert in the preamble. Wherefore the extent of the law is to be derived from the body of the law, the preamble often exceeding or falling short of this extent. There is one very faulty method of drawing up the laws, *viz.*, when the case is largely set forth in the preamble, and then, by the force of the word *which*, or some such relative, the body of the law is reflected back upon the preamble, and the preamble inserted and incorporated in the body of the law. Whence proceed both obscurity and danger, because the same care is not usually employed in weighing and examining the words of the preamble as the words of the law itself." (Bac. de Aug. Sci.). The preambles of the treason and heresy laws of the Tudors are the most curious in our statute book; see for example, 1 Edw. 6, c. 12. In 3 M. & S. 66, Lord Ellenborough said, "Whether general words in the enacting part of a statute are to be restrained or not by the particulars recited in the preamble, must depend on a fair exposition of the particular statute in each particular case, and not upon any universal rule of construction." See also 1 Beat. 124; 7 B. & C. 660; and the late case of *Salkeld* v. *Johnson*, (1 Hare, pp. 196, 207). Again, we may gather the meaning of one section of an act by comparing it with another, or by taking a general view of the whole act. (6 Rep. 76 b.; 1 Atk. 182; 7 B. & C. 660; 9 Sim. 533; and the modern reports, passim). But care must be taken in applying these rules, that we so construe every part of the act, that the whole may, if possible, stand,—*ut res magis valeat quam pereat.* (Vide post, p. 89).

[61]

the nominations to benefices by the pope were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only [14].

4. the consequence,

4. As to the *effects* and *consequence*, the rule is, that where words bear either none, or a very absurd signification [15], if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf [p], which enacted, "that whoever drew blood in the streets should be punished with the utmost severity," was held after a long debate not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit.

and 5, the reason and spirit of the law.

5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislature to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius [q]. There was a law, that those who in a storm forsook the ship, should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease

[p] l. 5, c. 12, § 8.

[q] l. 1, c. 11.

(14) For other examples of the application of this rule of construction, see the construction put upon the word "maintenance," in the stat. West. 1, c. 25, and 2, c. 43; (Artic. sup. Chartas, c. 11)—"false informers and evil procurers of dozens." (Artic. sup. Chartas, c. 10; 2 Inst. 561); —"English money," (2 Inst. 741).

(15) Or a signification contrary to natural law and reason; as for instance, to make a man a judge in his own cause. (2 Inst. 25). So the statute (1 Ed. 2) De frangentibus prisonam enacts, that a prisoner who breaks prison is guilty of felony; but if the prison be on fire, this is not so, "for he is not to be hanged, because he would not stay to be burnt." (Plowd. 13). Words in statutes, if they be general, and not express or precise, shall be restrained unto the fitness of the matter or person. As in the statute of wrecks, the provision that goods wrecked, if any live domestic creature (post, p. 292) remains in a vessel, shall be preserved to the use of the owner, who shall make his claim within the space of a year, does not extend to fresh victuals or perishable commodities; for, in these and like cases, general words may be taken to a foreign intent, but never to an unreasonable, impertinent, or repugnant intent. (Bac. Max. p. 52).

was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel: but this is a merit which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation.

The "equity of a statute."

From this method of interpreting laws, by the reason of them, arises what we call *equity*; which is thus defined by Grotius[r], "the correction of that, wherein the law (by reason of its universality) is deficient." For, since in laws all cases cannot be foreseen or expressed, it is necessary that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, "*lex non exacte definit, sed abitrio boni viri permittit*[16].

[62]

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest

[r] De Æquitate, § 3.

(16) I cannot forbear observing, (said Lord Tenterden), that I think there is always danger in giving effect to what is called "the equity of a statute;" and that it is much safer and better to rely on and abide by the plain words; although the legislature might possibly have provided for other cases, had their attention been directed to them. (6 B. & C. 475). And in a recent case, in which this rule was much discussed, Mr. Justice Coleridge said, "It is, in my opinion, so important for the court, in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language in order to meet either an alleged convenience or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a section which is within its words, but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute; and also to adhere to the literal interpretation, is to decide inconsistently with other overruling provisions of the same statute." (6 A. & E. 7).

thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind [17].

(17) The only equity according to this description, which exists in our government, either resides in the king, who cannot prevent the *summum jus* from becoming *summa injuria*, by an absolute or a conditional pardon, or in juries, who determine whether any, or to what extent damages shall be rendered. But equity, as here explained, is by no means applicable to the Court of Chancery; for the learned judge has elsewhere truly said, that "the system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection."—[CHRISTIAN].

SECTION III.

OF THE LAWS OF ENGLAND.

THE municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law. Division of the laws of England.

The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions. I. leges non scriptæ.

When I call these parts of our law *leges non scriptæ*, I would not be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic Druids committed all their laws as well as learning to memory [a]; and it is said of the primitive Saxons here, as well as their brethren on the continent, that *leges sola memoria et usu retinebant* [b]. But with us, at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us

[64]

[a] Cæs. de B. G. lib. 6, c. 13. [b] Spelm. Gl. 362.

from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non scriptum* to be that which is "*tacito et illiterato hominum consensu et moribus expressum.*"

Our ancient lawyers, and particularly Fortescue [c], insist with abundance of warmth that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some; but in general, as Mr. Selden in his notes observes, this assertion must be understood with many grains of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another: though doubtless, by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they must have insensibly introduced and incorporated many of their own customs with those that were before established; thereby in all probability improving the texture and wisdom of the whole by the accumulated wisdom of divers particular countries. Our laws, saith Lord Bacon [d], are mixed as our language: and as our language is so much the richer, the laws are the more complete.

The laws of Alfred.

And indeed our antiquaries and early historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us, that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his *dome-book*, or *liber judicialis*, for the general use of the whole kingdom [1]. This book is said to have been extant so late as the reign of king Edward the Fourth, but is now unfortunately lost. It contained, we may probably suppose,

[65]

[c] c. 17.

[d] See his proposals for a digest.

(1) It is a loose report of late writers that Alfred compiled a dom-boc or general code for the government of his kingdom. (Hallam. Mid. Ag. ii. 402).

the principal maxims of the common law, the penalties for misdemesnors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of king Edward the Elder, the son of Alfred [e]. "*Omnibus qui reipublicæ præsunt etiam atque etiam mando, ut omnibus æquos se præbeant judices, perinde ac in judiciali libro* (*Saxonice*, bom boc) *scriptum habetur: nec quicquam formident quin jus commune*, (*Saxonice*, polcpihte) *audacter libereque dicant.*"

But the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code of Alfred in many provinces to fall into disuse; or at least to be mixed and debased with other laws of a coarser alloy. So that about the beginning of the eleventh century there were three principal systems of laws prevailing in different districts. 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the ancient Britons; and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon-Lage*, or laws of the West Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above mentioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, the very name of which speaks its original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that piratical people. As for the very northern provinces, they were at that time under a distinct government [f].

Out of these three laws Roger Hoveden [g] and Ranulphus Cestrensis [h] inform us, king Edward the Confessor extracted one uniform law or digest of laws [2], to be observed throughout

[66]

The laws of Edward the Confessor.

[e] c. 1.
[f] Hal. Hist. 55.
[g] In Hen. II.
[h] In Edw. Confessor.

(2) The extant remains of these laws, as set forth in Lambard and Wilkins, are now, by our most eminent antiquarians, considered spurious. They

the whole kingdom; though Hoveden and the author of an old manuscript chronicle[i] assure us likewise, that this work was projected and begun by his grandfather king Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces governed by peculiar customs. As in Portugal, under king Edward, about the beginning of the fifteenth century[k]: in Spain, under Alonzo X., who, about the year 1250, executed the plan of his father St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *las partidas*[l]: and in Sweden, about the same era; when a universal body of common law was compiled out of the particular customs established by the laghman of every province, and entitled the *land's lagh*, being analogous to the *common law* of England[m].

Both these undertakings of king Edgar and Edward the Confessor, seem to have been no more than a new edition, or fresh promulgation of Alfred's code or dome-book, with such additions and improvements as the experience of a century and a half had suggested. For Alfred is generally styled by the same historians the *legum Anglicanarum conditor*, as Edward the Confessor is the *restitutor*. These however are the laws which our historians so often mention under the name of the laws of Edward the Confessor; which our ancestors struggled so hardly to maintain under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. These are the laws that so
[67] vigorously withstood the repeated attacks of the civil law; which established in the twelfth century a new Roman empire over most of the states of the continent: states that

[i] In Seld. ad Eadmer, 6.
[k] Mod. Un. Hist. xxii. 135.
[l] Ibid. xx. 211.
[m] Ibid. xxxiii. 21, 58.

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contain internal evidence that they are of a later date, and little is to be found in them which could make them so dear, as the code of Edward the Confessor is known to have been, to the English commonalty. (Smyth's Lect. on Hist. i. 168; Hallam. Mid. Ag. ii. 444; and the Anglo-Saxon laws, printed under the direction of the Commissioners of the Public Records, 1840).

have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which gave rise and original to that collection of maxims and customs which is now known by the name of the common law. A name either given to it, in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like; or more probably, as a law common to all the realm, the *jus commune* or *folk-right* mentioned by king Edward the Elder, after the abolition of the several provincial customs and particular laws before mentioned.

But though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs so collected, are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long-established custom. Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary [3]. This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

The common law consists of, 1. general customs;

This unwritten or common law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

2. local customs;

3. particular laws.

(3) This expression comprises the period elapsed since 1189, (1 Ric. 1). (Bracton. c. 2. c. 22). It was adopted by analogy to the stat. 3 Edw. 1, c. 29, which fixed that as the period in which the demandant in a writ of right must have alleged seisin. (Co. Lit. 115 a; 2 Roll. Abr. *Prescription*, fol. 14).

To give affirmative evidence of a custom for so long a period soon became very difficult, and in many cases impossible. Evidence of its existence therefore during a shorter time was held to raise a presumption that it had existed for the necessary period; nevertheless, where its commencement was proved to have been within the period of legal memory, this first presumption became rebutted. (1 Cr. M. & R. 894, and infra, p. 76).

[68]

1. general customs

I. As to general customs, or the common law, properly so called; this is that law by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the chancery, the king's bench, the common pleas, and the exchequer;—that the eldest son alone is heir to his ancestor;—that property may be acquired and transferred by writing;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favourably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and punishable by fine and imprisonment;—all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

Some have divided the common law into two principal grounds or foundations: 1. Established customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest: and 2. Established rules and maxims; as, "that the king can do no wrong, that no man shall be bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage: and the only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it.

[69]

must be settled by judicial decisions,

But here a very natural and very material question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide

according to the law of the land. Their knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue[n] mentions; and from being long personally accustomed to judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in public repositaries[4] set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises in the determination of which former precedents may give light or assistance. And therefore, even so early as the Conquest, we find the "*præteritorum memoria eventorum*," reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriæ optime instituti*[o]." For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be

and preserved in our public records.

[70]

[n] cap. 8.

[o] Seld. Review of Tithes, c. 8.

(4) By 1 & 2 Vic. c. 94, provision has been made for the better custody and future preservation of these records, and for allowing the free use of them, as far as stands with their safety and integrity and the public policy of the realm. For the state in which they then were, see the Report on the Public Records.

found that the former decision is manifestly absurd or unjust, it is declared not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded[p]. And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration[5]. To illustrate this doc-

[p] Herein agreeing with the civil law, Ff. 1, 3, 20, 21. "*Non omnium, quæ a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum quæ constituuntur, inquiri non oportet: alioquin multa ex his, quæ certa sunt, subvertuntur.*"

(5) It is to be lamented that the limits allowed to "judicial discretion" in "creating new precedents," are, upon the whole, so ill defined. "In every court," said Lord Eldon, (6 Dow. 112), "if a case varies from the facts and circumstances of preceding authorities, the judge is at liberty to found a new decision on these circumstances; but it never fell from a judge in this country, that he would obey a solemn judgment in one case, and not in others. That is a doctrine to which our courts are not accustomed." (See also 2 Br. P. C. 214). "Discretion," said Lord Mansfield, in *Wilkes's case*, (4 Burr. 2539), "when applied to a court of law, means sound discretion, guided by law. It must be governed by rule, not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular." (See also Stra. 755, and 4 T. R. 737).

In questions affecting property, unfulfilled contracts, and existing instruments, the authority of erroneous precedents seems at its maximum. The notorious *Bewdly case*, (1 P. Wms. 207), where the practice of a court for several years, though directly contrary to the words of an act of Parliament, was held obligatory, (that is to say, "the

trine by examples. It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord[6]. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath, and the law. For herein there is nothing repugnant to natural justice; though the artificial reason of it, drawn from the [71] feodal law, may not be quite obvious to every body. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seise any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was *not law*. So that *the law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law. Upon the whole, however, we make take it as a general rule, "that

law of that court;") can be supported only upon this principle. (Comb. 342). So, when existing negotiable instruments are affected, a single authority must be supported; though, if the matter had been *res integra*, the judge might have decided otherwise. (2 Wils. 87; 6 B. & C. 533). When the titles to real property are affected by the decision, existing rules, (although the reason thereof may have ceased,) must always be followed. (4 Burr. 2580). Here the argument, *ab inconvenienti*, is inadmissible. (1 Burr. 100). In fact, where the rights of things are affected, the argument *ab inconvenienti* must always be in favour of following even absurd and unreasonable precedents; for the instruments by which property passes from one owner to another, can be framed only upon existing authorities. "The absurdity of *Lord Lincoln's case* is shocking; however, it is now law," said Lord Mansfield. (Dougl. 722). This regard for existing contracts and instruments affecting property, even where framed on a mistaken view of the law, is the source whence has sprung the great respect, with which judges have treated "the practice of conveyancers." (1 T. R. 768; 6 Ves. 184; 4 M. & C. 404).

(6) This is no longer the law. It has been altered by 3 & 4 Wm. 4, c. 106, s. 9, which enacts that relations of the half-blood shall inherit after relations in the same degree of the whole blood (Vide infra, vol. ii. 227).

the decisions of courts of justice are the evidence of what is common law:" in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future [q].

explained in our reported cases,

The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record, the arguments on both sides and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of king Edward the Second
[72] inclusive; and from his time to that of Henry the Eighth were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published *annually*, whence they are known under the denomination of the *year books*. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day: for, though king James the First at the instance of lord Bacon appointed two reporters [r] with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands; who, sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by lord chief justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his

[q] "*Si imperalis majestas causam cognitionaliter examinaverit, et partibus, cominus constitutis, sententiam dixerit, omnes omnino judices, qui sub nostro imperio sunt, sciant hanc esse legem, non solum illi causæ pro qua producta est, sed et in omnibus similibus.*" C. I. 14, 12.

[r] Pat. 15, Jac. I. p. 18. 17 Rym. 26.

works. However, his writings are so highly esteemed, that they are generally cited without the author's name [s].

and digested by the sages of the law.

Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staundforde, with some others of ancient date; whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the same learned judge we have just mentioned, sir Edward Coke; who hath written four volumes of institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by judge Littleton, in the reign of Edward the Fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the ancient reports and year books, but greatly defective in method [t]. The second volume is a comment upon many old acts of parliament, without any systematical order; the third, a more methodical treatise of the pleas of the crown; and the fourth, an account of the several species of courts [u].

[73]

And thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom or common law, from time to time declared in the decisions

[s] His reports, for instance, are styled, κατ' ἐξοχην, *the reports*; and in quoting them we usually say, 1 or 2 Rep. not 1 or 2 Coke's Rep. as in citing other authors. The reports of judge Croke are also cited in a peculiar manner, by the names of those princes in whose reigns the cases reported in his three volumes were determined, viz., queen Elizabeth, king James, and king Charles the First; as well as by the number of each volume. For sometimes we call them 1, 2, and 3 Cro. but more commonly Cro. Eliz. Cro. Jac. and Cro. Car.

[t] It is usually cited either by the name of Co. Litt. or as 1 Inst.

[u] These are cited as 2, 3, or 4 Inst. without any author's name. An honorary distinction, which, we observed, is paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

The Roman law, as practised in the times of its liberty, paid also a great regard to custom; but not so much as our law: it only then adopting it, when the written law was deficient; though the reasons alleged in the digest[u] will fully justify our practice, in making it of equal authority with, when it is not contradicted by, the written law. "For since," says Julianus, "the written law binds us for no other reason but because it is approved by the judgment of the people, therefore those laws which the people have approved without
[74] writing ought also to bind every body. For where is the difference, whether the people declare their assent to a law by suffrage or by a uniform course of acting accordingly?" Thus did they reason while Rome had some remains of her freedom; but when the imperial tyranny came to be fully established, the civil laws speak a very different language. "*Quod principi placuit legis habet vigorem, cum populus ei, et in eum, omne suum imperium et potestatem conferat*"[7], says

[u] Ff. 1, 3, 28.

(7) This is the first sentence of the definition of a constitution in the beginning of the Institutes, I. 2, 6. It is no wonder, from this specimen, that the civil law should have experienced such protection and patronage from all the despotic governments of Europe, and such opposition and detestation from the sturdy English barons.—[CHRISTIAN,] (vide supra, p. 19). In Fortescue's Treatise, which was composed for the instruction of Prince Edward, son of Hen. 6, the chancellor, (c. 34), informs that prince that some of his royal ancestors had endeavoured to introduce the civil law into this country, because, says the author, "in that law the prince's pleasure standeth in force of a law; but the laws of England admit no such maxim, or anything equivalent to it." The regal attempts to introduce the civil law into England, however, reduce themselves to the encouragement of the professors of the civil law by Edw. 1, the patronage and profession of its principles by Rich. 2, and some doubtful facts in the reign of Hen. 6. (Hurd's Dialogues on the Constitution, Sullivan's Lectures). One of the articles of impeachment against Wolsey was, that he had endeavoured so subvert "*antiquissimas leges hujus regni, universum-que hoc regnum legibus imperialibus subjicere.*" James 1 highly extolled the civil law, and made no secret of his attachment to its arbitrary doctrines and maxims on all points of "kingcraft." It was also somewhat encouraged by Charles 1, under the advice of Laud. (Straff. Let. i. 130, 176, 201).

Ulpian [w]. "*Imperator solus et conditor et interpres legis existimatur* [x]," says the code: and again, "*sacrilegii instar est rescripto principis obviari* [y]." And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.

II. The second branch of the unwritten laws of England are particular customs, or laws which affect only the inhabitants of particular districts. II. Particular customs affecting particular districts or persons.

These particular customs, or some of them, are without doubt the remains of that multitude of local customs before mentioned, out of which the common law, as it now stands, was collected at first by king Alfred, and afterwards by king Edgar and Edward the Confessor: each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament [z].

Such is the custom of gavelkind in Kent and some other parts of the kingdom (though perhaps it was also general till the Norman conquest), which ordains, among other things, that not the eldest son only of the father shall succeed to his [75] inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord.—Such is the custom that prevails in divers ancient boroughs, and therefore called borough-English, that the youngest son shall inherit the estate, in preference to all his elder brothers.—Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas at the common law she shall be endowed of one third part only.—Such also are the special and particular customs of manors,

[w] Ff. 1, 4, 1.
[x] c. 1, 14, 12.
[y] c. 1, 23, 5.
[z] Mag. Cart. 9 Hen. III. c. 9; 1 Edw. III. st. 2, c. 9; 14 Edw. III. st. 1, c. 1; and 2 Hen. IV. c. 1.

of which every one has more or less, and which bind all the copyhold and customary tenants that hold of the said manors. —Such likewise is the custom of holding divers inferior courts, with power of trying causes, in cities and trading towns; the right of holding which, when no royal grant can be shewn, depends entirely upon immemorial and established usage.—Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law of the land, and are good only by special usage; though the customs of London are also confirmed by act of parliament [a].

To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants, or *lex mercatoria:* which, however different from the general rules of the common law, is yet engrafted into it, and made a part of it [b]; being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that "*cuilibet in sua arte credendum est*" [8].

The rules relating to particular customs regard either the

[a] 8 Rep. 126; Cro. Car. 347. [b] Winch. 24.

(8) The *lex mercatoria*, or the custom of merchants, which is mentioned very early in our laws, (see 27 Ed. 3, st. 2, c. 8, 19, 20; 2 Inst. 58), comprehends the rules and customs relating to bills of exchange, mercantile contracts, sale, purchase, and barter of goods, freight, insurance, bottomry and respondentia bonds, lien, stoppage in transitu, partnership, &c. "The custom of merchants," said Lord Mansfield, "when established and settled by known decisions, is the general law of the kingdom, and therefore ought not to be left to a jury after it has been already settled by judicial determinations; but where it is doubtful, it may be fit to ascertain from merchants the facts, but not merely their opinions." (2 Burr. 1226, 1228; 1 W. Bl. 298, 9). "Before the time of Lord Mansfield," says Mr. J. Buller, "we find that, in courts of law, all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time, we all know the great study has been to find out some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard those principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country." (2 T. R. 73).

proof of their existence; their *legality* when proved; or their usual method of *allowance*. And first we will consider the rules of *proof*.

[76]

On the proof of customs.

As to gavelkind, and borough-English, the law takes particular notice of them [c], and there is no occasion to prove that such customs [9] actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded [d], and as well the existence of such customs must be shewn, as that the thing in dispute is within the custom alleged. The trial in both cases (both to shew the existence of the custom, as, "that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female;" and also to shew, "that the lands in question are within that manor") is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court [e].

The customs of London differ from all others in point of trial: for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth of their recorder [f] [10]; unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c., for then the law permits them not to certify on their own behalf [g].

On the legality of customs.

When a custom is actually proved to exist, the next inquiry is into the *legality* of it; for, if it is not a good custom, it ought to be no longer used. "*Malus usus abolendus*

[c] Co. Litt. 175.
[d] Litt. § 265.
[e] Dr. and St. 1, 10.
[f] Cro. Car. 516.
[g] Hob. 85.

(9) This is laid down rather too widely. The law only dispenses with proof of the essential custom characteristic of gavelkind and borough-English tenures; *viz.*,—that lands of the latter tenure shall descend to the youngest son alone, and those of the former to all the males equally. (1 Lev. 81; 2 Sid. 153). All other customs alleged to affect lands of these tenures must be specially pleaded; as the custom that gavelkind lands are devisable at common law, (Cro. Car. 562), and that the widow shall have a moiety for dower. (1 Sid. 138).

(10) For an account of the manner in which this is done, see Cro. Car. 516; 1 Burr. 248. When a custom has been once certified by the recorder the judges will take notice of it, and not suffer it to be certified a second time. In the city court, they take notice of their own customs without proof. (Dougl. 365, 378).—[CHITTY.]

est" is an established maxim of the law [h]. To make a particular custom good, the following are necessary requisites:

Customs must be ancient,

1. That it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can shew the beginning of it, it is no good custom [11]. For which reason no custom can prevail against an express act of parliament; since the statute itself is a proof of a time when such a custom did not exist [i] [12].

[77]

uninterrupted,

2. It must have been *continued.* Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right;* for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom [k]. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the

[h] Litt. § 212; 4 Inst. 274.
[i] Co. Litt. 113, 115.
[k] Co. Litt. 114.

(11) Formerly, all customs must have been proved affirmatively as far back as the nature of the case made it reasonable to expect evidence to be still in existence, if the alleged custom had existed; (10 East, 476; 2 Brod. & Bing. 403; 5 Tyrw. 316); or at least for the period of twenty years; (6 East, 214; 2 B. & C. 54); a period adopted by the judges by analogy to the Statute of Limitation. From this evidence a jury might presume the immemorial existence of the alleged custom. But the efficacy thus given to the evidence of temporary usage, beyond its simple and natural force, being entirely technical, and being a heavy tax on the consciences and good sense of jurors, the 2 & 3 Wm. 4, c. 71, commonly called the Prescription Act, was passed, which in a large class of cases shortens the legal time of prescription to twenty years, making undisturbed usage for that period a bar or title in itself, which formerly was so only by the intervention of a jury. (1 Cr. M. & R. 217). Analogous provision has been made, with regard to the time required to establish a modus or exemption from tithes, by 2 & 3 Wm. 4, c. 100. A custom has also been sustained, which was proved to have existed from time immemorial till 1689, in the absence of any proof of its having been exercised or interfered with since that date. (11 A. & E. 819). Vide infra, vol. 2, p. 266.

(12) Therefore a custom that every pound of butter sold in a certain market should weigh eighteen ounces is bad, because it is directly contrary to 13 & 14 Car. 2, c. 26, which directs that every pound throughout the kingdom shall contain sixteen ounces. Nevertheless, it seems to have been the opinion of the judges that a custom to sell "lumps of butter," containing eighteen or any other stated number of ounces, might be good and valid. (3 T. R. 271). See also 4 T. R. 314; 6 T. R. 338; 4 Taunt. 102; 11 East, 300; M'Cl. & Y. 119.

custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

peaceably enjoyed,

3. It must have been *peaceable*, and acquiesced in; not subject to contention and dispute[l]. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting[13].

reasonable,

4. Customs must be *reasonable*[m]; or rather, taken negatively, they must not be unreasonable[14]. Which is not always, as sir Edward Coke says[n], to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits[o].

[78]

certain,

5. Customs ought to be *certain*. A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good[p]. A custom to pay two-pence an acre in lieu of tithes is good; but to pay sometimes two-pence and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate is good; though the value is a thing uncertain: for the value

[l] Co. Litt. 114.
[m] Litt. § 212.
[n] Co. Litt. 62.
[o] Co. Copyh. § 33.
[p] 1 Roll. Abr. 565.

(13) 10 East, 476; 2 Brod. & Bing. 403.

(14) 1 Wils. 63; Willes, 202; 5 Tyrw. 361; 5 Bing. 165.

may at any time be ascertained; and the maxim of law is *id certum est, quod certum reddi potest* [15].

compulsory,

6. Customs, though established by consent, must be (when established) *compulsory*; and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

and consistent with other customs.

7. Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom [q].

Next, as to the *allowance* of special customs. Customs, in derogation of the common law, must be construed strictly [16]. Thus, by the custom of gavelkind, an infant of fifteen years
[79] may by one species of conveyance (called a deed of feoffment) convey away his lands in fee simple, or for ever. Yet this custom does not empower him to use any other conveyance,

[q] 9 Rep. 68.

(15) A custom that poor housekeepers shall carry away rotten wood in a chase is bad, being too vague and uncertain. (2 T. R. 758). A right to glean in the harvest field cannot be claimed at common law; neither have the poor of a parish, legally settled there, any such right. (1 H. Bl. 51, 52). So a custom for every inhabitant of an ancient messuage within a parish to take a profit *à prendre* in the land of an individual is bad. But such a right may be enjoyed by prescription or grant. (4 T. R. 717; 2 H. Bl. 393; 1 Ld. Raym. 407; 1 Saund. 341, n. 3; 346, n. 3).

(16) Co. Cop. 33; 11 Mod. 161. Thus where there is a custom that lands shall descend to the eldest sister, the courts will not extend this to an eldest niece, or any other eldest female relation. (1 T. R. 466). But if a man seised of gavelkind lands hath issue, three sons, one of whom dies in the life of the father, leaving issue a daughter, she shall inherit the part of her father, *jure representationis*, yet she is not within the words of the custom. (1 Salk. 243).

or even to lease them for seven years: for the custom must be strictly pursued[r]. And, moreover, all special customs must submit to the king's prerogative [17]. Therefore, if the king purchases lands of the nature of gavelkind, where all the sons inherit equally; yet, upon the king's demise, his eldest son shall succeed to those lands alone [s]. And thus much for the second part of the *leges non scriptæ*, or those particular customs which affect particular persons or districts only.

III. The third branch of them are those peculiar laws [18] which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws. III. Peculiar laws used in particular courts and jurisdictions.

It may seem a little improper at first view to rank these laws under the head of *leges non scriptæ*, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of sir Matthew Hale [t], because it is most plain, that it is not on account of their On the authority of the civil and canon laws.

[r] Co Cop. § 33.
[s] Co. Litt. 15.
[t] Hist. C. L. c. 2.

(17) It will be gathered from the example in the text that this only means that general or special customs lose their effect when this subject matter becomes vested in the monarch. (Co. Lit. 15 b.) Vide infra, p. 261, 262.

(18) Although Blackstone, following Hale, includes the civil law among the "laws of England," it may be questioned whether it is strictly "law," even in the courts where it is permitted to be used. It cannot be predicated of this code as it may be of the canon law, that a certain class of persons are bound by the authority propounding it. Nor again, can it be said of the civil as it may be of the canon law, that the legislature has to some extent sanctioned it; for, on the contrary, Blackstone has already told us (p. 19) that several parliaments have solemnly declared "that the realm of England hath never been, nor shall it be governed by the civil law." Moreover, if the courts of judicature, in which the civil law and canons are received, adopt their rules, another court of judicature can always reject them without the aid of the legislature, a principle which seems to go far to prove that neither of these codes have the essential characteristic of "law," and to reduce their authority in our law to the level of that of the Apocrypha in our faith; that is,—they may be read for "instruction," and may be cited for "example," but they "establish" no obligatory rule of conduct. (Art. vi.)

being *written* laws, that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England doth not, nor ever did, recognize any foreign power as superior or equal to it in this kingdom; or as having the right to give law to any, the meanest of its
[80] subjects. But all the strength that either the papal or imperial laws have obtained in this realm, (or indeed in any other kingdom in Europe), is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptæ*, or customary laws: or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptæ*, or statute law. This is expressly declared in those remarkable words of the statute 25 Hen. VIII. c. 21, addressed to the king's royal majesty.—"This is your grace's realm, recognizing no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained *within* this realm for the wealth of the same; or to such other as, by sufferance of your grace and your projenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same: not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the *customed* and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise."

The Roman or civil law.

By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the institutes, the code, and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be

occasion to cite them, by way of illustrating [19] our own laws, it may not be amiss to give a short and general account.

The Roman law (founded first upon the regal constitutions of their ancient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers, and lastly upon the imperial decrees, or constitutions of successive emperors) [81] had grown to so great a bulk, or, as Livy expresses it, [u], "*tam immensus aliarum super alias ascervatarum legum cumulus*," that they were computed to be many camels' load by an author who preceded Justinian [v]. This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodosius the younger, by whose orders a code was compiled, A.D. 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe, till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly-erected kingdoms. For Justinian commanded only in the eastern remains of the empire; and it was under his auspices, that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

The Theodosian code.

This consists of, 1. The institutes, which contain the elements or first principles of the Roman law, in four books. 2. The digests, or pandects, in fifty books, containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code, or collection of imperial constitutions, in twelve books; the lapse of a whole

The Pandects of Justinian.

[u] L. 3, c. 34.

[v] Taylor's Elements of Civil Law, 17.

(19) So far as the civil law lays down the rights and duties of kings and subjects, its principles and maxims seem to illustrate our law, entirely by way of contrast. But it must not be supposed that the entire code, or indeed any great proportion of it, relates to these matters. It treats of the social rights and duties of individuals in all relations *inter se*; thus of parents and children, of adoptions, guardians, &c., of the rights of property, as of contracts, obligations, covenants, testaments, fiduciary interests, &c.; and on these subjects its general principles are founded on natural equity, and have to a great extent been incorporated into our own jurisprudence.

century having rendered the former code, of Theodosius, imperfect. 4. The novels, or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian; which however fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi in Italy: which accident, concurring with the policy of the Roman ecclesiastics [w], suddenly gave new vogue and authority to the civil law, introduced it into
[82] several nations, and occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded.

The canon law. The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see. All which lay in the same disorder and confusion as the Roman civil law: till about the year 1151 [20], one Gratian, an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions also into some method, in three books; which he entitled *concordia discordantium canonum*, but which are generally
Gratian's decree, known by the name of *decretum Gratiani*. These [21] reached as low as the time of pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX., were published in much the same method, under the auspices of that
The decretals of Gregory IX., and of Boniface VIII., pope, about the year 1230, in five books; entitled *decretalia Gregorii noni*. A sixth book was added by Boniface VIII. about the year 1298, which is called *sextus decretalium*.
the constitutions of Clement V., The Clementine constitutions, or decrees of Clement V.,

[w] See § 1, page 18.

(20) Before the 12th century the canon laws which governed the Western churches was the collection made by Dionysius Exiguus, in 520, the capitularies of Charlemagne, and the decrees and pontifical epistles of Syricus and Anastacius, who were popes at the end of the 4th and beginning of the 5th centuries.

(21) The origin of the canon law is traced by Gratian from Constantine the Great, the first Christian emperor.

were in like manner authenticated in 1317 by his successor John XXII.; who also published twenty constitutions of his own, called the *extravagantes Joannis:* all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes, in five books, called *extravagantes communes.* And all these together, Gratian's decree, Gregory's decretals, the sixth decretal, the Clementine constitutions, and the extravagants of John and his successors, form the *corpus juris canonici,* or body of the Roman canon law [22].

and the extravagantes of John XXII. and his successors.

Besides these pontifical collections, which during the times of popery were received as authentic in this island as well as in other parts of Christendom, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this church and kingdom. The *legatine* constitutions were ecclesiastical laws, enacted in national synods, held under the cardinals Otho and Othobon, legates from pope Gregory IX. and pope Clement IV. in the reign of king Henry III. about the years 1220 and 1268. The *provincial* constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton in the reign of Henry III. to Henry Chichele in the reign of Henry V.; and adopted also by the province of York [x] in the reign of Henry VI [23]. At the dawn of the Reformation, in the reign of king Henry VIII. it was enacted in parliament [y] that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And as no such review

The legatine and provincial constitutions.

[83]

[x] Burn's Eccl. Law, pref. viii.

[y] Statute 25 Hen. VIII. c. 19; revived and confirmed by 1 Eliz. c. 1.

(22) The main design of the entire Roman canon law was to support the despotism and extend the authority of the Roman pontiffs; but several most learned and eminent writers of the Romish communion acknowledge that it is full of errors and defects. (Mosh. E. H. iii. 35).

(23) The English constitutions have been commented upon by several English canonists, the chief of whom is Lyndwood, who lived in the beginning of the 15th century, and is said by Godolphin to have been dean of the Arches in the reign of Hen. 6.

has yet been perfected, upon this statute[24] now depends the authority of the canon law in England.

The canons of 1603.

As for the canons enacted by the clergy under James I. in the year 1603, and never confirmed in parliament, it has been solemnly adjudged, upon the principles of law and the con-

(24) The 25 Hen. 8, c. 19, recites that the clergy besought the king "that the constitutions and canons should be committed to the examination and judgment of his highness and of thirty-two of his highness' subjects, whereof sixteen were to be of the clergy; and that such constitutions and canons as should be thought and determined by the said two-and-thirty persons, or the more part of them, worthy to be abrogated and annulled, should be abolished and made of no value accordingly; and such other of the same constitutions and canons as by the said two-and-thirty, or the more part of them, should be approved to stand with the laws of God, and consonant to the laws of this realm, should stand in their full strength and power, the king's most royal assent being first had and obtained to the same." This ecclesiastical commission was extended by 27 Hen. 8, c. 15, beyond the then session of parliament, and by 35 Hen. 8, c. 16, during the life of the king. The 25 Hen. 8, c. 19, also enacted that "until such time as the king and the said two-and-thirty persons should have accomplished the effects and contents before rehearsed, such canons, constitutions, ordinances, synodal or provincial, or other ecclesiastical laws or jurisdictions spiritual, as he yet accustomed and used here in the church of England, which necessarily and conveniently are requisite to be put in use and execution for the time, not being repugnant, contrarient, or derogatory to the laws or statutes of the realm, nor to the prerogatives of the regal crown of the same, shall be occupied, exercised, and put in use for the time, within this realm;" from which it seems that at that period no canon or constitution of the church was considered to be generally binding, unless by general adoption and usage it had become part of the ecclesiastical common law of this land. The provisions and objects of these statutes not having been carried into effect in the reign of Hen. 8, the 3 & 4 Edw. 6, c. 11, appointed a new commission, also directed to thirty-two persons, to prepare a complete code of canon law. By a committee of eight out of the said thirty-two commissioners, a work analogous to the Roman decretals was composed, called "*Reformatio Legum Ecclesiasticarum*," which is spoken of by Lord Stowell (1 Hag. Con. 179), "as a work of great authority in determining the practice of the times, whatever may be its correctness in matters of law." The early death of Edw. 6, prevented any steps being taken to ratify this code. In the reign of Mary all the above acts were repealed, but in the reign of Elizabeth they were revived, and extended to the queen's heirs and successors; but no future steps were taken to carry the purposes of 25 Hen. 8, c. 19, into practical execution.—Much of the canon law has, however, been virtually adopted into our system, and has during many centuries been accommodated by our own lawyers to the local habits and customs of the country, and these laws owe their authority to their being, as described in the preamble to the 25 Hen. 8, c. 21, "laws which the people have taken at their own free liberty, by their own consent." (Gibs. Intr. to Cod. 27; 2 Atk. 673; Palm. 458; Vaugh. 21; 3 Phill. 162; 1 Hag. Con. 393, 464).

stitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity [z]; whatever regard the clergy may think proper to pay them [25].

[z] Stra. 1057.

(25) As the canons of 1603 were represented to be a careful selection of the best from the ancient law, and are the most modern ecclesiastical code, of any pretence to authority in this country, a short analysis of them will be useful to the reader.

The 1st of them directs all ecclesiastical persons having care of souls, "to the uttermost of their wit, knowledge, and learning, purely and sincerely, and without any colour or dissimulation, to teach, manifest, open, and declare, four times every year at the least, in their sermons, &c., the doctrine of the king's supremacy." By the 2nd, all persons who "affirm that the king's majesty hath not the same authority in clauses ecclesiastical that the godly kings had among the Jews and christian emperors of the primitive church, are declared *ipso facto* excommunicate;" and by the 3rd to the 12th, all impugners of the services, articles or ceremonies of the Church of England, all schismatics, maintainers of conventicles, &c., are visited with the same punishment. From the 13th to the 30th, provision is made for the decent and solemn performance of divine service and administration of the sacraments;—from the 31st to the 76th, for the qualifications, ordination, duties, functions, behaviour, and garments of ministers; from the 80th to the 88th, for bibles, fonts, communion tables, and for cleaning and repairing churches. Some of these are rather characteristic of the reign of James 1. Thus the 72nd directs that "no minister shall attempt to cast out any devil or devils, without license under the hand and seal of the bishop of the diocese;" and the 74th, that "archbishops, deans, priests, and other ecclesiastical persons shall not wear coifs, or wrought nightcaps, but only plain nightcaps of black silk, satin, or velvet, and that they shall not go out in their doublet and hose, without coats or cassocks, nor wear any light coloured stockings." From the 89th to the 138th, the duties of churchwardens, and parish clerks; the mode of proceeding in the ecclesiastical courts; the offices of the judges, proctors, surrogates, registrars, door-keepers, &c., are regulated. By one of these, (the 133rd) proctors are censured and commanded "to refrain loud speech and babbling; and to behave themselves quietly and modestly in court." The 77th, 78th, and 79th, relate to the licensing of schoolmasters; on which see *Douse's case*, 1 Lord Raym. 672; *Davison's case*, 1 Salk. 105; *Burdett's case*, 2 Salk. 672; *Cox's case*, 1 P. Wms. 29, and 6 T. R. 490. The 139th excommunicates those who shall affirm, that "the sacred synod" is not the true Church of England by representation; a canon, the authority of which depends on a palpable *petitio principii*. The 140th excommunicates those who shall deny, that these canons have authority over laity as well as clergy; an excommunication which might include, besides Blackstone, Lord Coke and all the judges of England, (2 Inst. 599; 5 Rep.); Lord C. J. Holt, (1 Salk. 134); Lord Keeper Wright, and Justices Treby and Powell, (1 P. Wms. 32); Lord Chancellor Hardwicke and the other judges, (Str. 1056); and again, (2 Atk. 158); and every other judge who has had occasion to consider the authority of ecclesiastical canons; for it has always been held by the temporal

The courts which receive the peculiar laws,

There are four species of courts, in which the civil and canon laws are permitted (under different restrictions) to be used. 1. The courts of the archbishops and bishops, and their derivative officers, usually called, in our law, courts christian, *curiæ christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom; corroborated in the latter instance by act of parliament, ratifying those charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them [a].

[84]

are controlled

1. And, first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess [26], and (in case of contumacy) to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal [27].

and guided by the courts of common law,

2. The common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of these courts, or the matters depending before them. And, therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than

[a] Hale Hist. c. 2.

judges that those of 1603 do not bind the laity. (See also Carth. 485; 1 Lord Raym. 447, 539). The last of these canons, (the 141st,) constitutes and ordains, that all persons who shall maintain that this synod "was a company of such persons as did conspire together against godly and religious professors of the gospel, and that they and their proceedings ought to be despised and contemned, &c., shall be excommunicated, and not restored until they repent and publicly revoke that their wicked error;" an excommunication, which, if we may judge from the puritan writings of the time, as completely failed to terrify the antagonists of the synod into respectful language, as the *ipso facto* excommunications failed to produce submission and uniformity.

(26) In Str. 1067, Lord Chancellor Talbot said: "We cannot trust the ecclesiastical courts to determine what is a matter merely spiritual." See also 2 Inst. 623; 1 D. & R. 460; 1 B. & C. 655.

(27) 2 Inst. 623; 16 Ves. 346; 3 Campb. 388, and infra, vol. 3, p. 101.

what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them [28].

3. An appeal lies from all these courts [29] to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own.— And, from these three strong marks and ensigns of superiority, it appears beyond a doubt, that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviori lege;* and that, thus admitted, restrained, altered, new-modelled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws.

and an appeal lies from them.

Let us next proceed to the *leges scriptæ*, the written laws of the kingdom; which are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled [b]. The oldest of these now extant, and printed in our statute books, is the famous *magna charta*, as confirmed in parliament 9 Henry III.: though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.

[85]

II. LEGES SCRIPTÆ OR STATUTE LAW.

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only take notice of the different kinds of statutes; and of some general rules with regard to their construction [c].

[b] 8 Rep. 20.

[c] The method of citing these acts of parliament is various. Many of our ancient statutes are called after the name of the place where the parliament was held that made them; as the statutes of Merton and Marleberge, of Westminster, Gloucester, and Winchester. Others are denominated entirely from their subject; as the sta-

(28) 2 Inst. 623; 7 A. & E. 721.

(29) 4 Inst. 123, 134, 321. Infra, book 3, chap. 5. On appeals from these courts to the privy council, see 2 & 3 Wm. 4, c. 92; 3 & 4 Wm. 4, c. 41; 3 & 4 Vict. c. 65, 66, and 6 & 7 Vict. c. 38.

General or public acts.

First, as to their several kinds [30]. Statutes are either *general* or *special, public* or *private* [31]. A general or public act is an universal rule, that regards the whole community: and of

tutes of Wales and Ireland, the *articuli cleri*, and the *prærogativa regis*. Some are distinguished by their initial words, a method of citing very ancient; being used by the Jews in denominating the books of the pentateuch; by the Christian church in distinguishing their hymns and divine offices; by the Romanists in describing their papal bulls; and in short by the whole body of ancient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also; in imitation of all which, we still call some of our old statutes by their initial words, as the statutes of *quia emptores*, and that of *circumspecte agatis*. But the most usual method of citing them, especially since the time of Edward the Second, is by naming the year of the king's reign in which the statute was made, together with the chapter or particular act, according to its numeral order, as 9 Geo. II. c. 4. For all the acts of one session of parliament taken together make properly but one statute; and therefore when two sessions have been held in one year, we usually mention stat. 1 or 2. Thus the bill of rights is cited, as 1 W. & M. st. 2, c. 2, signifying that it is the second chapter or act, of the second statute, or the laws made in the second session of parliament in the first year of king William and queen Mary.

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(30) Statutes of all kinds passed before 33 Geo. 3, c. 15, may be correctly described as of the regnal year in which the session of parliament began, though the session extended into another regnal year, in which the statute was in fact passed, (2 M. & S. 123). Thus, the statutes printed in the statute-book as of 29 Eliz. must be recited or pleaded as of the 28 Eliz.; for the session of the parliament which passed those acts commenced on the 29th October, 1586, which was in the 28th Eliz. (9 Mood. 425; 2 Bing. 255; 3 Camp. 345). On the other hand, statutes passed since 33 Geo. 3, c. 15, are incorrectly described as of the regnal year in which the session of parliament commenced, unless they received the royal assent in that year.

The proper mode to plead or recite every statute is, to describe it as "passed in the session of parliament held in the — year (or — and — years) of the reign of," &c., (1 A. & E. 377), except in acts of the reign of Philip & Mary, (1 Cowp. 474).

To describe a statute, whether before or since 33 Geo. 3, c. 13, as passed in two regnal years, is always inaccurate, and in pleading fatal, (8 M. & W. 223).

(31) In parliamentary language, these are again subdivided as follows: The public acts are subdivided into *general*, as the Reform Act, the annual Mutiny Act, &c.; *local*, as church building acts, canal and railway acts, parish acts, county acts, &c.; and *personal*, as patent acts, attainder acts, &c. The private acts are subdivided into *local*, as enclosure acts, &c.; and *personal*, as estate acts, divorce acts, naturalization acts, &c.; but many private acts by a special clause, are declared to be public acts, so as not to require to be specially pleaded, (Bac. Ab. Stat. F.) The printed statutes are classed under four heads, viz.: public general acts; local and personal acts declared public, and to be judicially noticed; private acts, printed by the queen's printer, and whereof the printed copies may be given in evidence; and private acts not printed.

this the courts of law are bound to take notice judicially and *ex officio;* without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns: such as the Romans entitled *senatûs-decreta*, in contradistinction to the *senatûs-consulta*, which regarded the whole community [d]: and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shewn and pleaded [32]. Thus, to show the distinction, the statute 13 Eliz. c. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the bishop of Chester to make a lease to A. B. for sixty years, is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act. [86]

Special or private.

Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus the statute of Treasons, 25 Edw. III. cap. 2, doth not make any new species of treasons; but only, for the benefit of the subject, declares and enumerates those several kinds of offence which before were treason at the common law. Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the

Declaratory.

Remedial.

[d] Gravin, Orig. 1, § 24.

(32) 4 Rep. 13 a. 76 a; 1 T. R. 125; 2 T. R. 569. On the origin of private acts, see Reeve's History of the English Law, iii. 379; iv. 129. They appear to have been first used for purposes of attainder.

[87]

common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into *enlarging* and *restraining* statutes. To instance again in the case of treason. Clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law: therefore it was thought expedient by statute 5 Eliz. cap. 11, to make it high treason, which it was not at the common law: so that this was an *enlarging* statute.[33] At common law also spiritual corporations might lease out their estates for any term of years, till prevented by the statute 13 Eliz. before mentioned: this was therefore a *restraining* statute.

Rules of construction.

Secondly, the rules to be observed with regard to the construction of statutes are principally these which follow[34]:

In remedial statutes the mischief is to be suppressed and the remedy to be advanced.

1. There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief[35]. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy[e]. Let us instance

[e] *Heydon's case*, 3 Rep. 7; Co. Litt. 11, 42.

(33) According to this example, every statute, which increases the punishment of an offence, would be an enlarging statute. The 32 Hen. 8, c. 28, which enables tenants in tail and other persons to grant leases, which could not be granted at common law, would have been a better instance of an enlarging statute. But all remedial statutes relating to the alienation of property are better known and classed as enabling and disabling statutes. On the classification of statutes, see Dwarris on Statutes, Chap. x.

(34) I do not know whether I need remind the reader that the rules of construction in the text, like the rules of interpretation mentioned at p. 60, supra, are of very doubtful and difficult application, where the legislature has used plain and unambiguous words. In such cases, as Lord Redesdale said with respect to the point involved in the Queensberry leases, (1 Bligh. 497), the proper mode of disposing of difficulties arising from a liberal construction, is by an act of parliament, and not by the decision of a court of justice.

(35) In *Heydon's case*, the judges resolved:—"that in all statutes, be they penal or beneficial, restricting or enlarging of the common law, four things are to be discerned and considered, *viz.* (1.) What was the common law before the making of the act? (2.) What was the mischief and defect against which the common law did not provide? (3.) What remedy the parliament hath resolved and applied to cure the disease of the common-

again in the same restraining statute of 13 Eliz. c. 10. By the common law, ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors: the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty-one years. Now in the construction of this statute it is held, that leases, though for a longer term, if made by a bishop, are not void during the bishop's continuance in his see; or, if made by a dean and chapter, they are not void during the continuance of the dean: for the act was made for the benefit and protection of the successor [f]. The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors; but the leases, during their continuance, being not within the mischief, are not within the remedy. [88]

Statutes treating of inferiors are not to be extended to superiors.

2. A statute, which treats of things or persons of an inferior rank, cannot, by any *general words* be extended to those of a superior [36]. So a statute, treating of "deans, prebendaries, parsons, vicars, *and others having spiritual promotion*," is held not to extend to bishops, though they have spiritual promotion; deans being the highest persons named, and bishops being of a still higher order [g].

[f] Co. Litt. 45; 3 Rep. 60; 10 Rep. 58.

[g] 2 Rep. 46.

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wealth? and (4.) The true reason of the remedy.

"It was then held to be the duty of the judges at all times, to make such construction as should suppress the mischief and advance the remedy, putting down all subtle inventions and evasions for continuance of the mischief *et pro privato commodo*, and adding force and life to the cure and remedy, according to the true intent of the makers of the act *pro bono publico*."

By this rule, the letter of an act has been sometimes enlarged, sometimes restrained, and sometimes, it has been said, even contradicted; so as to embrace other cases, conveyances, times, places, persons, and things, besides those contained and expressly mentioned by the legislature. The cases are collected and arranged in Dwarris on Statutes, pp. 717-736.

(36) There is one exception to this rule, *viz.*, where the general words would otherwise be entirely void. Thus, the statute of Marlbridge, (c. 19,) enumerates essoigns in counties, hundreds, or in courts baron, or in other courts; and the general words "other courts" were held to extend to the king's courts of record at Westminster and elsewhere. (2 Inst. 137).

Modern statutes of importance have what is commonly called a "dictionary clause," the object of which is to define what persons, things, and places, &c., shall be included in every general word

Penal statutes are to be construed strictly.

3. Penal statutes must be construed strictly [37]. Thus the statute 1 Edw. VI. c. 12, having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but one *horse* [38], and therefore procured a new act for that purpose in the following year [h]. And, to come nearer our own times, by the statute 14 Geo. II. c. 6, stealing sheep, *or other cattle*, was made felony without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II. c. 34, ex-

[h] 2 & 3 Edw. VI. c. 33; Bac. Elem. c. 12.

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used in the act. For example, the first section of the Limitation of Actions act, 3 & 4 Wm. 4, c. 27, defines what shall be included in the words "land," "rent," and "person." (See Bac. Abr. *Statute*).

How far the queen is bound by acts of parliament, in which she is not expressly named, vide infra, p. 262.

(37) In penal statutes, those words only are taken strictly and literally which define and set down the fact and the punishment; and not those which relate to unimportant circumstances, or the putting of cases. Thus, the statute of Gloucester, which gives the action of waste against him who holds for a term of years, or for life, extends to a person who holds but for one year. But if the law be, that for a certain offence a man shall lose his right hand, and the offender hath already lost his right hand, he shall not lose his left hand, but, the crime shall rather pass without punishment, (Bac. Max. 58, 59; Plowd. 467).

All the old doctrine of constructive treason was based on a violation of this rule. But the law of England does not allow of offences by construction, and no case shall be holden to be reached by penal laws, but such as are within both the spirit and the letter of such laws. "If this rule be violated," said Chief Justice Best, (3 Bing .580,) "the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws." See also 5 T. R. 101; 6 T. R. 286.

(38) The reason of the difficulty in this case, was because the 37 Hen. 8, was expressly in the singular number;—"if any man do steal any horse, mare, or filly." And then the statute of 1 Edw. 6, c. 12, by varying the number, and at the same time expressly repealing all other exclusions of clergy introduced since the beginning of the reign of Henry 8, raised a presumption that the legislature intended to restore clergy where only one horse was stolen, (2 Hale, P. C. 365). It has since been decided, that where statutes use the plural number, a single instance will be comprehended. The 2 Geo. 2, c. 25, enacts, that it shall be felony to steal any "bank notes;" and it has been determined, that the offence is complete by stealing one bank note. *Hassel's case*, (1 Leach, Cr. L. p. 1).—[CHITTY.]

tending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name [39].

Statutes against frauds are to be construed liberally.

4. Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly: but when the statutes act upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5, which avoids all gifts of goods, &c. made to defraud creditors *and others*, was held to extend by the general words to a gift made to defraud the queen of a forfeiture [i] [40].

[89]

Every part of a statute must, if possible, stand.

5. One part of the statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat.* As if land be vested in the king and his heirs by act of parliament, saving the right of A.; and A. has at that time a lease of it for three years: here A. shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But,

A saving repugnant to the body of an act is void.

6. A saving, totally repugnant to the body of the act, is void. If therefore an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A. in the king, saving the right of A.: in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king [k] [41].

[i] 3 Rep. 82.

[k] 1 Rep. 47.

(39) By this act it was also declared, that the 14 Geo. 2, c. 6, should extend to no other cattle than those specified. Consequently, horses, pigs, and goats, have been decided to be excepted, (3 Bing. 581). Yet horses are "cattle" within the Black Act, 9 Geo. 1, c. 22, (2 W. Bl. 721); and bulls are not "cattle" within Mr. Martin's Act, 3 Geo. 4, c. 71, (3 C. & P. 225), which was therefore extended by 5 & 6 Wm. 4, c. 59, s. 2.

(40) To understand perfectly the principles upon which this rule is founded, the student should peruse the resolutions of the judges cited by Lord Coke, (3 Rep. 82), the case referred to by Blackstone.

(41) But a proviso, (that is, a clause engrafted upon a preceding and complete enactment, 9 B. & C. 835), though totally repugnant to the body or provision of the act shall not be void,

Common law gives place to a statute, and an old statute to a new one.

7. Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one[42]. And this upon a general principle of universal law, that "*leges posteriores priores contrarias abrogant:*" consonant to which, it was laid down by a law of the twelve tables at Rome, that "*quod populus postremum jussit, id jus ratum esto.*" But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant, that it necessarily implies a negative. As, if a former act says, that a juror upon such a trial shall have twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks: here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made a qualification sufficient, the former
[90] statute which requires twenty pounds is at an end[l]. But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter-sessions, and the latter law makes the same offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, *and not elsewhere*[m].

If a repealing statute be repealed the first statute is revived.

8. If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose[43]. So, when the statutes of 26 and

[l] Jenk. Cent. 2, 73.

[m] 11 Rep. 63.

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but shall stand; being held to be a repeal of the preceding enactment, by analogy to the well-known rule of construction applicable to testamentary instruments:—that a later clause, if inconsistent with a former one, expresses the last intention, and revokes the preceding expressions, (Fitz. 195; Bac. Abr. *Statute*).

(42) So, if two acts of parliament, having been passed during the same session, and coming into operation on the same day, be repugnant to each other, the act which last received the royal assent will be considered *pro tanto*, a repeal of the other, (2 B. & Ad. 818; 2 Bing. N. C. 679), for that purpose, unless the later act contain something which manifests an intention that the earlier should continue repealed.

(43) This rule was established by the resolutions of the judges in the House of Lords in the *Bishops' case.*

35 Henry VIII., declaring the king to be the supreme head of the church, were repealed by a statute 1 and 2 Philip and Mary, and this latter statute was afterwards repealed by an act of 1 Eliz., there needed not any express words of revival in queen Elizabeth's statute, but these acts of king Henry were impliedly and virtually revived [n].

Statutes to bind the legislature are inoperative.

9. Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII. c. 1, which directs that no person, for assisting a king *de facto*, shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder [o]. Because the legislature, being in truth the sovereign power, is always of equal, always of absolute, authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavoured to tie up the hands of succeeding legislatures. "When you repeal the law itself," says he, "you at the same time repeal the prohibitory clause, which guards against such repeal" [p].

[91]

Statutes impossible to be performed are void.

10. Lastly, acts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void [44].

Unreasonable statutes.

[n] 4 Inst. 325.

[o] Ibid. 43.

[p] *Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat*, l. 3, Ep. 23.

(12 Rep. 7). For modern examples of the application of this rule, see 3 Bing. 493; 9 B. & C. 344; 10 B. & C. 39.

(44) Such was the language of Lord Chief Justice Hobart in *Day* v. *Savage*, (Hob. 87). Lord Coke, in *Bonham's case*, (8 Rep. 115), lays down the principle in somewhat more guarded terms, reducing it in effect to the same principle already laid down with respect to common law and customs.

"If," said Lord Coke, (8 Rep. 118 a,) "an act of parliament be against common right and reason, or repugnant or impossible to be performed, the common law will control it and adjudge it to be void." To this doctrine Lord Chief Justice Holt assented, in the *City of London* v. *Wood*

But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus, if an act of parliament gives a man power to try all causes that arise within his manor of Dale; yet if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel [q]. But, if we could conceive it possible for the parliament to enact that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words as leave no doubt whether it was the intent of the legislature or no.

Courts of equity. [92]

These are the several grounds of the laws of England: over and above which, equity is also frequently called in to assist, to moderate, and to explain them. What equity is, and how impossible in its very essence to be reduced to stated rules, hath been shewn in the preceding section. I shall therefore only add, that (besides the liberality of sentiment with which our common law judges interpret acts of parliament, and such rules of the unwritten law as are not of a positive kind) there are also peculiar courts of equity established for the benefit of the subject; to detect latent frauds and concealments, which the process of the courts of law is

[q] 8 Rep. 118.

(12 Mod. 687); and it was justly said in 10 Mod. 115, that "an act of parliament against natural equity must be void from its first creation, for *jura naturæ sunt immutabilia, et leges legum.* But this must be a very clear case, and judges will strain hard rather than interpret an act of parliament, void *ab initio.*"

not adapted to reach; to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law. This is the business of our courts of equity [45], which are, however, only conversant in matters of property. For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be restrained by partiality to inflict a penalty beyond what the letter will warrant; but, in cases where the letter induces any apparent hardship, the crown has the power to pardon.

(45) The origin, nature, and extent of the jurisdiction of the courts of equity are more fully discussed hereafter. (Vol. iii., c. 27).

SECTION IV.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

The common law only affected England.

THE kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries; of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.

Wales is by statute subjected to the laws of England.

Wales had continued independent of England, unconquered and uncultivated, in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general, for many centuries; even from the time of the hostile invasions of the Saxons, when the ancient and christian inhabitants of the island retired to those natural intrenchments, for protection from their pagan visitants. But when these invaders themselves were converted to christianity, and settled into regular and potent governments, this retreat of the ancient Britons grew every day narrower; they were overrun by little and little, gradually driven from one fastness to another, and by repeated losses abridged of their wild independence. Very early in our history we find their princes doing homage to the crown of England; till at length in the reign of Edward the First, who may justly be styled the conqueror of Wales, the line of their ancient princes was abolished, and

the king of England's eldest son became, as a matter of course [1], their titular prince; the territory of Wales being then entirely re-annexed (by a kind of feodal resumption) to the dominion of the crown of England [a]; or, as the statute of Rhudlan [b 2] expresses it, "*terra Walliæ cum incolis suis, prius regi jure feodali subjecta,* (of which homage was the sign) *jam in proprietatis dominium totaliter et cum integritate conversa est, et coronæ regni Angliæ tanquam pars corporis ejusdem annexa et unita.*" By the statute also of Wales [c] very material alterations were made in divers parts of their laws, so as to reduce them nearer to the English standard, especially in the forms of their judicial proceedings: but they still retained very much of their original polity; particularly their rule of inheritance, *viz.* that their lands were divided equally among all the issue male, and did not descend to the eldest son alone. By other subsequent statutes their provincial immunities were still farther abridged: but the finishing stroke to their independency was given by the statute 27 Hen. VIII. c. 26, which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and made fellow-citizens with

[a] Vaugh. 400.
[b] 10 Edw. I. 2
[c] 12 Edw. I.

(1) This expression is somewhat inaccurate; for, if the king's eldest son became titular prince of Wales "as a matter of course," he ought to have become prince of Ireland also. For the origin and nature of this title, vide infra, p. 224.

(2) The learned judge has made a mistake in referring to the statute, which is called the statute of Rutland, in the 10 Edw. 1, but which does not at all relate to Wales. But the 12 Edw. 1, or statute of Rutland, as it is called in Vaughan, (p. 400), is the same as the statutum Walliæ. Mr. Barrington, in his Observations on the Ancient Statutes, (p. 120,) tells us, that the statutum Walliæ bears date *apud Rothelanum*, which is now called Rhuydland, in Flintshire. Though Edward says, that *terra Walliæ prius regi jure feodali subjecta*, yet Mr. Barrington assures us, that the feudal law was then unknown in Wales, and that "there are at present in North Wales, and it is believed in South Wales, no copyhold tenures, and scarcely an instance of what we call manorial rights; but the property is entirely free and allodial." Edward, however, was a conqueror, and he had a right to make use of his own words, in the preamble to his law."—[CHRISTIAN.] (See also Reeves's History of the English Law, ii. 95).

their conquerors. A generous method of triumph, which the republic of Rome practised with great success; till she reduced all Italy to her obedience, by admitting the vanquished states to partake of the Roman privileges.

No other laws of force in Wales.

It is enacted by this statute 27 Hen. VIII. 1. That the dominion of Wales shall be for ever united to the kingdom of England. 2. That all Welshmen born shall have the same liberties as other the king's subjects. 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent. 4. That the laws of England, and no other, [95] shall be used in Wales: besides many other regulations of the police of this principality. And the statute of 34 and 35 Hen. VIII. c. 26, confirms the same, adds farther regulations, divides it into twelve shires[3], and, in short, reduces it into the same order in which it stands at this day; differing from the kingdom of England in only a few particulars, and those too of the nature of privileges (such as having courts within itself, independent of the process of Westminster-hall), and some other immaterial peculiarities, hardly more than are to be found in many counties of England itself[4].

On the laws of Scotland before the union.

The kingdom of Scotland, notwithstanding the union of the crowns on the accession of their king James VI. to that of England, continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected; which was judged to be the more easy to be done, as both kingdoms were anciently under the same government, and still retained a very great resemblance, though far from an identity in their laws. By an act of parliament, 1 Jac. I. c. 1, it is declared that these two mighty,

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(3) By the 27 Hen. 8, c. 26, the county of Monmouth, (which till that time had been part of Wales,) was enabled to send two members to parliament; and each of the other counties and the towns in Wales, represented in parliament, was by 34 & 35 Hen. 8, c. 26, enabled to return one member only; but by the Reform Act, three of the counties, viz., Carmarthen, Denbigh, and Glamorgan, have been enabled to send an additional member each, and Merthyr Tydvil has been created a borough, and returns one member.

(4) The 20 Geo. 2, c. 42, s. 3, declares that the word "England," in all acts of parliament, shall be taken and deemed to include the dominion of Wales and town of Berwick-upon-Tweed.

By 1 Wm. 4, c. 70, the Welsh courts, both of law and equity, have been abolished, and the administration of justice in the principality is now uniform with that of England.

famous, and ancient kingdoms were formerly one. And sir Edward Coke observes[d], how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their ancient laws, the descent of the crown, their parliaments, their titles of nobility, their officers of state and of justice, their writs, their customs, and even the language of their laws. Upon which account he supposes the common law of each to have been originally the same; especially as their most ancient and authentic book, called *regiam majestatem*, and containing the rules of *their* ancient common law, is extremely similar to that of Glanvil, which contains the principles of *ours*, as it stood in the reign of Henry II. And the many diversities subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in two large and uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments, which have in many points altered and abrogated the old common law of both kingdoms.

[96]

Union of England with Scotland effected by 5 Anne, c. 8.

However, sir Edward Coke, and the politicians of that time, conceived great difficulties in carrying on the projected union: but these were at length overcome, and the great work was happily effected in 1707, 5 and 6 Anne; when twenty-five articles of union were agreed to by the parliaments of both nations; the purport of the most considerable being as follows:

1. That on the first of May, 1707, and for ever after, the kingdom of England and Scotland shall be united into one kingdom, by the name of Great Britain.

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.

3. The united kingdom shall be represented by one parliament.

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

9. When England raises 2,000,000*l.* by a land tax, Scotland shall raise 48,000*l.*

16, 17. The standards of the coin, of weights, and of

[d] 4 Inst. 345.

measures, shall be reduced to those of England, throughout the united kingdoms.

11. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England. But all the other laws of Scotland shall remain in force; though alterable by the parliament of Great Britain. Yet with this caution: that laws relating to public policy are alterable at the discretion of the parliament; laws relating to private right are not to be altered but for the evident utility of the people of Scotland.

[97] 22. Sixteen peers are to be chosen[5] to represent the peerage of Scotland in parliament, and forty-five[6] members to sit in the house of commons.

23. The sixteen peers of Scotland shall have all privileges of parliament: and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union, and shall have all privileges of peers, except sitting in the house of lords, and voting on the trial of a peer[7].

These are the principal of the twenty-five articles of union, which are ratified and confirmed by the statute 5 Ann. c. 8, in which statute there are also two acts of parliament recited; the one of Scotland, whereby the church of Scotland and also the four universities of that kingdom are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, 5 Ann. c. 6, whereby the acts of uniformity of 13 Eliz. and 13 Car. II. (except as the same had been altered by parliament at that time) and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated, that

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(5) The oaths to be taken on these elections have been prescribed and regulated by various statutes. See 2 & 3 Wm. 4, c. 63.

(6) These were increased by the Scotch Reform Act, (2 & 3 Wm. 4, c. 65), to fifty-three, of whom thirty are representatives for counties, and twenty-three for boroughs.

(7) This article has been so construed as to exclude the crown from creating new Scotch peerages with the elective right; on the ground that it would be an interference with the elective rights of the peerages of Scotland *in esse* at the time of the union. On this article see Fort. 165, and 1 P. Wms. 582.

every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick-upon-Tweed. And it is enacted, that these two acts "shall for ever be observed as fundamental and essential conditions of the union."

Upon these articles and act of union, it is to be observed, 1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points, which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the union"[e]. 2. That whatever else may be deemed "fundamental and essential conditions, the preservation of the two churches of England and Scotland, in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitution of either of those churches, or in the liturgy of the

Fundamental principles of the union.

[98]

[e] It may justly be doubted, whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would of itself dissolve the union; for the bare idea of a state, without a power somewhere vested to alter every part of its laws, is the height of political absurdity. The truth seems to be, that in such an *incorporate union* (which is well distinguished by a very learned prelate from a *fœderate alliance*, where such an infringement would certainly rescind the compact), the two contracting states are totally annihilated, without any power of a revival; and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside. (See Warburton's Alliance, 195.) But the wanton or imprudent exertion of this right would probably raise a very alarming ferment in the minds of individuals; and therefore, it is hinted above that such an attempt might *endanger* (though by no means *destroy*) the union.

To illustrate this matter a little farther; an act of parliament to repeal or alter the act of uniformity in England, or to establish episcopacy in Scotland, would doubtless, in point of authority, be sufficiently valid and binding; and, notwithstanding such an act, the union would continue unbroken. Nay, each of these measures might be safely and honourably pursued, if respectively agreeable to the sentiments of the English church, or the kirk in Scotland. But it should seem neither prudent, nor perhaps consistent with good faith, to venture upon either of those steps by a spontaneous exertion of the inherent powers of parliament, or at the instance of mere individuals. So sacred, indeed, are the laws above mentioned (for protecting each church and the English liturgy) esteemed, that in the regency acts, both of 1751 and 1765, the regents are expressly disabled from assenting to the repeal or alteration of either these, or the act of settlement.

church of England (unless with the consent of the respective churches, collectively or representatively given), would be an infringement of these "fundamental and essential conditions," and greatly endanger the union. 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and, as the parliament has not yet thought proper, except in a few instances [8], to alter them, they still (with regard to the particulars unaltered) continue in full force. Wherefore the municipal or common laws of England are, generally speaking, of no force or validity in Scotland; and of consequence, in the ensuing commentaries, we shall have very little occasion to mention, any farther than sometimes by way of illustration, the municipal laws of that part of the united kingdoms [9].

[99]

Town of Berwick-upon-Tweed.

The town of Berwick-upon-Tweed [10], was originally part of the kingdom of Scotland; and, as such, was for a time reduced by king Edward I. into the possession of the crown of England: and during such its subjection, it received from that prince a charter, which (after its subsequent cession by

(8) The 20 Geo. 2, c. 43, abolished heritable jurisdictions in Scotland. The 55 Geo. 3, c. 42, explained and amended by 59 Geo. 3, c. 35, 6 Geo. 4, c. 120, and 1 Wm. 4, c. 69, extended trial by jury in Scotland to civil cases. By 10 Geo. 4, c. 55, amended by 7 Wm. 4, and 1 Vict. c. 41, and 1 & 2 Vict. c. 119, small debts became recoverable in the Scotch sheriffs' courts. By 59 Geo. 3, c. 45, and 2 Wm. 4, c. 5, the constitution and jurisdiction of the courts of sessions have been regulated and amended. By 2 Wm. 4, c. 54, the Scotch court of exchequer was abolished. And by 2 & 3 Wm. 4, c. 33, amended by 4 & 5 Wm. 4, c. 82, the service of process issuing from the high court of chancery, is extended to every part of the United Kingdom. (Vide 2 M. & K. 289).

(9) When it is intended that Scotland shall not be included in an act of parliament, a special clause should be inserted for that purpose. (2 Burr. 853). The Scotch Municipal Law is to a very great extent founded on the civil law; and that in criminal as well as civil matters. Most of the distinctions between the Scotch law and our own are traceable to this source. (Roberts. Hist. of Scot. i. 43; Erskine's Inst. i. 1, s. 41). The history of the Scotch constitution before the union is condensed into the 17th chapter of Mr. Hallam's Constitutional History.

(10) In the case of *Rex* v. *Cowle*, (2 Burr. 834), Lord Mansfield collected and methodized all the learning respecting Berwick-upon-Tweed. The whole case well deserves an attentive perusal; as it not merely decides the points of law stated in the text, but elucidates the principles of the prerogative jurisdiction of the court of queens bench over all the dominions of the crown of England.

Edward Balliol, to be for ever united to the crown and realm of England) was confirmed by king Edward III. with some additions; particularly, that it should be governed by the laws and usages which it enjoyed during the time of king Alexander, that is, before its reduction by Edward I. Its constitution was new-modelled, and put upon an English footing by a charter of king James I.: and all its liberties, franchises, and customs, were confirmed in parliament by the statutes 22 Ed. IV. c. 8, and 2 Jac. 1, c. 28. Though therefore it had some local peculiarities, derived from the ancient laws of Scotland [f], yet it is clearly part of the realm of England, being represented by burgesses in the house of commons, and bound by all acts of the British parliament, whether specially named or otherwise. And therefore it was (perhaps superfluously) declared by statute 20 Geo. II. c. 42, that where England only is mentioned in any act of parliament, the same notwithstanding hath and shall be deemed to comprehend the dominion of Wales and town of Berwick-upon-Tweed. And though certain of the king's writs or processes of the courts of Westminster do not usually run into Berwick, any more than the principality of Wales, yet it hath been solemnly adjudged [g] that all prerogative writs (as those of *mandamus, prohibition, habeas corpus, certiorari, &c.*) may issue to Berwick, as well as to every other of the dominions of the crown of England, and that indictments and other local matters arising in the town of Berwick may be tried by a jury of the county of Northumberland [11].

As to Ireland [12], that is still a distinct kingdom; though a

Ireland was a distinct kingdom till the act of union, A. D. 1800.

[f] Hale Hist. C. L. 183; 1 Sid. 382, 462; 2 Show. 365.

[g] Cro. Jac. 543; 2 Rol. Abr. 292; stat. 11 Geo. I. c. 4; 2 Burr. 834, 855.

(11) By the 109th section of the Municipal Corporations Reform Act, (5 & 6 Wm. 4, c. 76,) it was enacted that Berwick-upon-Tweed and the other cities excepted out of 38 Geo. 3, c. 52, should thenceforth be on the same footing as other cities and counties of cities or towns corporate; except so far as relates to the return of members of parliament. (6 & 7 Wm. 4, c. 103, s. 6).

(12) The whole of the text to page 104 has now become matter of history, in consequence of the legislative union with Ireland, which was happily effected by the 39 & 40 Geo. 3, c. 47, and 40 Geo. 3, c. 38, (Irish stat.) The purport of the eight articles of this union are as follows:

Art. 1. That the kingdoms of Great Britain and Ireland shall on the first day of January, 1801, and for ever after, be united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland.

Art. 2. That the succession to the

[100]

dependent subordinate kingdom. It was only entitled the dominion or lordship of Ireland [h], and the king's style was no other than *dominus Hiberniæ*, lord of Ireland, till the thirty-third year of king Henry the Eighth; when he assumed the title of king [13], which is recognized by act of parliament

[h] Stat. Hiberniæ, 14 Hen. III.

imperial crown of the United Kingdom shall continue settled in the same manner as the succession to the crown of Great Britain and Ireland stood before limited.

Art. 3. That the said United Kingdom shall be represented in one and the same parliament, to be styled, "The Parliament of the United Kingdom of Great Britain and Ireland."

Art. 4. That four lords spiritual of Ireland, by rotation of sessions, and twenty-eight lords temporal of Ireland, elected for life by the peers of Ireland, shall sit in the House of Lords; and one hundred commoners, two for each county, two for the city of Dublin, and two for the city of Cork, one for Trinity College, and one for each of the thirty-one most considerable cities, and boroughs, shall be the number to sit and vote in the House of Commons on the part of Ireland; to which five were added by the Irish Reform Act, (2 & 3 Wm. 4, c. 88, s. 9.) By this Article the precedence of Irish peers was regulated, their power to sit in the House of Commons, &c.

Art. 5. That the churches of England and Ireland be united into one protestant episcopal church, to be called, "the United Church of England and Ireland," that the doctrine, worship, discipline, and government shall be and remain the same as already established in England; and that the continuance and preservation of the united church so established shall be deemed an essential and fundamental part of the union; and that in like manner the church of Scotland shall remain the same as is now established by law, and by the acts of union of England and Scotland.

Art. 6. That the subjects of Great Britain and Ireland shall be entitled to the same rights and privileges in trade and navigation, and also all treaties with foreign powers. That all prohibitions and bounties upon the importation of merchandize from one country to the other shall cease; but that the importation of certain articles therein enumerated shall be subject to the duties specified in the act.

Art. 7. That the sinking funds, and the interest of the national debt of each country shall be defrayed by each separately; and that for the space of twenty years after the union, the contribution of Great Britain and Ireland towards the public expenditure in each year shall be in the proportion of fifteen to two, subject to future regulations.

Art. 8. That all the laws and courts of each kingdom shall remain as by law then established, subject to alterations by the united parliament; but that all writs of error and appeal shall be decided by the House of Lords of the United Kingdom, except appeals from the court of admiralty in Ireland, which shall be decided by a court of delegates appointed by the court of chancery in Ireland; and that all existing laws contrary to these articles shall be, and the said are by the said act repealed. For an excellent review of the Constitutional History of Ireland before the union see the 18th chapter of Mr. Hallam's Constitutional History.

(13) This title was not strictly "assumed" by Henry 8, it having been conferred on him by an act of the Irish legislature. (33 Hen. 8, c. 1).

35 Hen. VIII. c. 3. But, as Scotland and England are now one and the same kingdom, and yet differ in their municipal laws; so England and Ireland are, on the other hand, distinct kingdoms, and yet in general agree in their laws. The inhabitants of Ireland are, for the most part, descended from the English, who planted it as a kind of colony, after the conquest of it by king Henry the Second; and the laws of England were then received and sworn to by the Irish nation, assembled at the council of Lismore [i]. And as Ireland, thus conquered, planted, and governed, still continues in a state of dependence, it must necessarily conform to, and be obliged by, such laws as the superior state thinks proper to prescribe.

The Brehon law.

At the time of this conquest the Irish were governed by what they called the Brehon law, so styled from the Irish name of judges, who were denominated Brehons [k]. But king John in the twelfth year of his reign went into Ireland, and carried over with him many able sages of the law; and there by his letters patent, in right of the dominion of conquest, is said to have ordained and established that Ireland should be governed by the laws of England [l]: which letters patent Sir Edward Coke [m] apprehends to have been there confirmed in parliament. But to this ordinance many of the Irish were averse to conform, and still stuck to their Brehon law: so that both Henry the Third [n] and Edward the First [o] were obliged to renew the injunction; and at length in a parliament holden at Kilkenny, 40 Edw. III. under Lionel duke of Clarence, the then lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. And yet, even in the reign of queen Elizabeth, the wild natives still kept and preserved their Brehon law; which is described [p] to have been "a rule of right unwritten, but delivered by tradition from one to another, in which often-

[101]

[i] Pryn. on 4 Inst. 249.

[k] 4 Inst. 358; Edm. Spenser's State of Ireland, p. 1513, edit. Hughes.

[l] Vaugh. 294; 2 Pryn. Rec. 85; 7 Rep. 23.

[m] 1 Inst. 141.

[n] A. R. 30; 1 Rym. Foed. 442.

[o] A. R. 5.—*Pro eo quod leges quibus utuntur Hybernici Deo detestabiles existunt, et omni juri dissonant, adeo quod leges censeri non debeant;—nobis et consilio nostro satis videtur expediens, eisdem utendas concedere leges Anglicanas.* 3 Pryn. Rec. 1218.

[p] Edm. Spenser, ibid.

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times there appeared great show of equity in determining the right between party and party, but in many things repugnant quite both to God's laws and man's." The latter part of this character is alone ascribed to it, by the laws before cited of Edward the First and his grandson.

Formerly not governed by English statutes unless named therein.

But as Ireland was a distinct dominion, and had parliaments of its own, it is to be observed, that though the immemorial customs, or common law of England, were made the rule of justice in Ireland also, yet no acts of the English parliament, since the twelfth of king John, extended into that kingdom; unless it were specially named, or included under general words, such as, "within any of the king's dominions." And this is particularly expressed, and the reason given in the year-books [q]: "a tax granted by the parliament of England shall not bind those of Ireland, because they are not summoned to our parliament:" and again, "Ireland hath a parliament of its own, and maketh and altereth laws; and our statutes do not bind them, because they do not send knights to our parliament: but their persons are the king's subjects, like as the inhabitants of Calais, Gascoigne, and Guienne, while they continued under the king's subjection." The general run of laws, enacted by the superior state, are supposed to be calculated for its own internal government, and do not extend to its distant dependent countries; which, bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But, when the sovereign legislature power sees it necessary to extend its care to any of its subordinate dominions, and mentions them expressly by name, or includes them under general words, there can be no doubt but then they are bound by its laws [r].

[102] The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parliaments at his pleasure, which enacted such laws as they thought proper [s]. But an ill use being made of this liberty, particularly by lord Gormanstown, deputy-lieutenant in the reign of Edward IV [t], a set of statutes were there enacted in the 10 Hen. VII. (sir Edward Poynings being then lord

[q] 20 Hen. VI. 8; 2 Ric. III. 12. Rep. 22, *Calvin's case.*
[r] Year-book, 1 Hen. VII. 3; 7
[s] Irish Stat. 11 Eliz. stat. 3, c. 8.
[t] Irish Stat. 10 Hen. VII. c. 23.

deputy, whence they are called Poynings' laws) one of which [u], in order to restrain the power as well of the deputy as the Irish parliament, provides, 1. That before any parliament be summoned or holden, the chief governor and council of Ireland shall certify to the king under the great seal of Ireland the considerations and causes thereof, and the articles of the acts proposed to be passed therein. 2. That after the king, in his council of England, shall have considered, approved, or altered the said acts or any of them, and certified them back under the great seal of England, and shall have given licence to summon and hold a parliament, then the same shall be summoned and held; and therein the said acts so certified, and no other, shall be proposed, received, or rejected [w]. But as this precluded any law from being proposed, but such as were preconceived before the parliament was in being, which occasioned many inconveniences and made frequent dissolutions necessary, it was provided by the statute of Philip and Mary before cited, that any new propositions might be certified to England in the usual forms, even after the summons and during the session of parliament. By this means however there was nothing left to the parliament in Ireland, but a bare negative or power of rejecting, not of proposing or altering any law. But the usage now is, that bills are often framed in either house, under the denomination of "heads for a bill or bills:" and in that shape they are offered to the consideration of the lord lieutenant and privy council: who upon such parliamentary intimation, or otherwise upon the application of private persons, receive and transmit such heads, or reject them without any transmission, to England. [103] And with regard to Poynings' law in particular, it cannot be repealed or suspended, unless the bill for that purpose, before it be certified to England, be approved by both the houses [x]. Poynings' laws.

But the Irish nation, being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law: and, the measure of justice in both kingdoms becoming thence no longer uniform, it was therefore enacted by another of Poynings' laws [y], that all acts of parliament, before made

[u] cap. 4, expounded by 3 & 4 Ph. & M. c. 4.

[w] 4 Inst. 353.

[x] Irish Stat. 11 Eliz. stat. 3, c. 38.

[y] cap. 22.

in England, should be of force within the realm of Ireland[z]. But, by the same rule, that no laws made in England, between king John's time and Poynings' law, were then binding in Ireland, it follows that no acts of the English parliament made since the 10 Hen. VII. do now bind the people of Ireland, unless specially named or included under general words[a]. And on the other hand it is equally clear, that where Ireland is particularly named, or is included under general words, they are bound by such acts of parliament. For this follows from the very nature and constitution of a dependent state: dependence being very little else, but an obligation to conform to the will or law of that superior person or state, upon which the inferior depends. The original and true ground of this superiority, in the present case, is what we usually call, though somewhat improperly, the right of conquest: a right allowed by the law of nations, if not by that of nature; but which in reason and civil policy can mean nothing more, than that, in order to put an end to hostilities, a compact is either expressly or tacitly made between the conqueror and the conquered, that if they will acknowledge the victor for their master, he will treat them for the future as subjects, and not as enemies[b].

[104] But this state of dependence being almost forgotten, and ready to be disputed by the Irish nation, it became necessary some years ago to declare how that matter really stood: and therefore by stat. 6 Geo. I. c. 5, it is declared, that the kingdom of Ireland ought to be subordinate to, and dependent upon, the imperial crown of Great Britain, as being inseparably united thereto; and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, hath power to make laws to bind the people of Ireland[14].

[z] 4 Inst. 351. [a] 12 Rep. 112.
[b] Puff. L. of N. viii. 6, 24.

(14) Prynne, in his learned argument, in *Lord Maguire's case*, (8 St. Tr. 343), has enumerated several English statutes from the time of King John, by which Ireland was bound. In that case Lord Connor Maguire, baron of Inneskillin, who had been the principal contriver and instigator of the Irish rebellion and massacre in the time of Car. I, had been brought to England to be tried in the king's bench at Westminster, by a Middlesex jury, and the question was, whether the prisoner was ousted of his trial by his peers

Thus we see how extensively the laws of Ireland communicate with those of England: and indeed such communication is highly necessary, as the ultimate resort from the courts of justice in Ireland is, as in Wales, to those in England; a writ of error (in the nature of an appeal) lying from the king's bench in Ireland to the king's bench in England[c], as the appeal from the chancery in Ireland lies immediately to the house of lords here: it being expressly declared, by the same statute, 6 Geo. I. c. 5, that the peers of Ireland have no jurisdiction to affirm or reverse any judgments or decrees whatsoever[15]. The propriety and even necessity, in all inferior dominions, of this constitution, "that, though justice be in general administered by courts of their own, yet that the appeal in the last resort ought to be to the courts of the superior state," is founded upon these two reasons. 1. Because otherwise the law, appointed or permitted to such inferior dominion, might be insensibly changed within itself, without the assent of the superior. 2. Because otherwise judgments might be given to the disadvantage or diminution of the superiority; or to make the dependence to be only of the person of the king, and not of the crown of England[d]. On appeals from the Irish courts.

[105]

With regard to the other adjacent islands which are subject to the crown of Great Britain, some of them (as the isle of Wight[16], of Portland, of Thanet, &c.) are comprised with- The isles of Wight, Portland, Thanet, &c.

[c] This was law in the time of Hen. VIII.; as appears by the ancient book, entitled *Diversity of Courts*, c. *bank le roy*.

[d] Vaugh. 402.

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in Ireland, by force of the statute 35 Hen. 8, c. 2. The court, after hearing Prynne's argument, overruled the prisoner's plea, which decision was approved of by a resolution of the two houses of parliament. Lord Maguire was, therefore, found guilty, and was afterwards executed at Tyburn as a traitor. — [CHRISTIAN.] (See also *Campbell* v. *Hall*, Cowp. 210).

(15) By 22 Geo. 3, c. 53, the statute of Geo. 1 was repealed. But by 23 Geo. 3, c. 28, Blackstone's reasoning respecting the necessity and propriety of the appeal being in all cases to the superior state was repudiated, and it was declared that in all cases whatever the people of Ireland should be bound only by laws enacted by his majesty and the parliament of that kingdom; and that no appeal or writ of error should be brought from any court in Ireland to any court in England. But since the union all writs of error and appeal from the Irish courts are to be brought to the House of Lords of the United Kingdom. (Vide Art. 8).

(16) The Isle of Wight is part of the county of Hampshire (4 Inst.

in some neighbouring county, and are therefore to be looked upon as annexed to the mother island, and part of the kingdom of England. But there are others which require a more particular consideration.

[106] Isle of Man.

And, first, the isle of Man is a distinct territory from England, and is not governed by our laws: neither doth any act of parliament extend to it, unless it be particularly named therein; and then an act of parliament is binding there [e]. It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to king John and Henry III. of England; afterwards to the kings of Scotland; and then again to the crown of England: and at length we find king Henry IV. claiming the island by right of conquest, and disposing of it to the earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to sir John de Stanley by letters patent 7 Hen. IV.[f] In his lineal descendants it continued for eight generations, till the death of Fernando earl of Derby, A.D. 1594: when a controversy arose concerning the inheritance thereof, between his daughters and William his surviving brother: upon which, and a doubt that was started concerning the validity of the original patent [g], the island was seised into the queen's hands, and afterwards various grants were made of it by king James the First; all which being expired or surrendered, it was granted afresh in 7 Jac. I. to William earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a restraint of the power of alienation by the said earl and his issue male. On the death of James earl of Derby, A.D. 1735, the male line of earl William failing, the duke of Atholl succeeded to the island as heir general by a female branch. In the mean time, though the title of king had long been disused, the earls of Derby, as lords of Man, had maintained a sort of royal authority therein; by assenting or dissenting to laws, and exercising an appellate jurisdic-

[e] 4 Inst. 284; 2 And. 116. [f] Selden, tit. hon. 1, 3.
[g] Camden, Eliz. A.D. 1594.

287; Cald. 21; Com. Dig. *Navigation*, F. 5, except for purposes of parliamentary representations. (2 & 3 Wm. 4, c. 45, s. 16),

tion. Yet, though no English writ[17], or process from the courts of Westminster, was of any authority in Man, an appeal lay from a decree of the lord of the island to the king of Great Britain in council[h]. But the distinct jurisdiction of this little subordinate royalty being found inconvenient for [107] the purposes of public justice, and for the revenue (it affording a commodious asylum for debtors, outlaws, and smugglers), authority was given to the treasury by statute 12 Geo. I. c. 28, to purchase the interest of the then proprietors for the use of the crown: which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III. c. 26 and 39[18], whereby the whole island and all its dependencies so granted as aforesaid (except the landed property of the Atholl family, their manorial rights and emoluments, and the patronage of the bishoprick[i] and other ecclesiastical benefices), are unalienably vested in the crown, and subjected to the regulations of the British excise and customs.

Islands of Jersey, Guernsey, Sark, Alderney, &c.

The islands of Jersey, Guernsey, Sark, Alderney, and their appendages, were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an ancient book of very great authority,

[h] 1 P. Wms. 329.

[i] The bishoprick of Man or Sodor, or Sodor and Man, was formerly within the province of Canterbury, but annexed to that of York, by statute 33 Hen. VIII. 3, 31 [19].

(17) The 56 Geo. 3, c. 100, s. 3, declares that the writ of habeas corpus shall run into the Isle of Man, but this and all other prerogative writs were issuable at common law to all the dominions of the crown. (2 Burr. 856). And by 2 & 3 Wm. 4, c. 33, and 4 & 5 Wm. 4, c. 82, process from the court of chancery also issues to the Isle of Man.

(18) Chap. 26 is called the vesting act, and chap. 39 the regulating act. The 43 Geo. 3, c. 123, settled a perpetual annuity equal to one-fourth of the revenue of customs arising within the Isle of Man, to be paid to the Duke of Atholl, and the heirs generally of the seventh Earl of Derby. But by 6 Geo. 4, c. 34, all the rights reserved to the Duke of Atholl by these acts were purchased for and are now vested in the crown. The customs, &c., of this island have been recently regulated by 3 & 4 Wm. 4, c. 60.

(19) By 6 & 7 Wm. 4, c. 77, steps were directed to be taken for uniting this bishoprick to that of Carlisle; but by 1 & 2 Vict. c. 30, this act, so far as it relates to the former bishoprick, was repealed.

entitled, *le grand coustumier*. The king's writ, or process from the courts of Westminster, is there of no force; but his commission is. They are not bound by common acts of our parliaments, unless particularly named[k]. All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to the king and council, in the last resort.

The plantations and colonies.

Besides these adjacent islands, our more distant plantations in America and elsewhere, are also in some respects subject to the English laws. Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these
[108] rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held[l], that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being[20], which are the birth-right of every subject[m], are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force[21]. What shall be admitted and

[k] 4 Inst. 286.

[l] Salk. 411, 666.

[m] 2 P. Wms. 75.

(20) All the statutes passed before the occupation or settlement of a colony have authority over the colony, but no statute which may be passed afterwards, unless the intention to include such colony clearly appear on the face of the statute. (4 Mod. 222; 4 Burr. 2500).

(21) Thus it has been decided that

what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council [22]: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother-country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country [n]. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire), or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother-country, but distinct (though dependent) dominions. They are subject, however, to the control of the parliament; though [109] (like Ireland, Man, and the rest) not bound by any acts of parliament, unless particularly named.

With respect to their interior polity, our colonies are properly of three sorts. 1. Provincial establishments [23], the Division of colonies.

[n] 7 Rep. 17, *Calvin's case*; Show. Parl. C. 31.

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the statutes of Mortmain do not extend to the colonies; the object of those statutes being wholly political, having grown out of local circumstances, and being intended to have only a local operation. (2 Mer. 143).

(22) In the great case of *Campbell* v. *Hall*, Cowp. 204, Lord Coke's doctrine, to the full extent laid down in *Calvin's case*, was denied by Lord Mansfield; and it was decided that, when the king had promised to a colony a local legislature, and had by his commission to the governor authorized the convocation of an assembly, he had thereby abandoned and lost his prerogative of legislating for such colony.

(23) Nearly all the colonies now belonging to Great Britain are of this sort. They may be arranged under two heads: first, those which, having been originally acquired by conquest or cession, retain their own laws, except as altered by the crown; secondly, those which, having been originally acquired by occupancy, are subject to the laws of England as in force at the time of occupancy, except as altered by parliamentary legislation.

The first of these classes may be sub-divided into those which have received constitutions from the crown, under which the royal prerogative of legislation has been abandoned to representative assemblies, and those which have not received such constitutions. Jamaica, and most of the West India islands are included in the

constitutions of which depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions; under the authority of which, provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of England. 2. Proprietary governments[24], granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties palatine: yet still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother-country. 3. Charter governments[25], in the nature of civil corporations, with the power of making bye-laws for their own interior regulation, not contrary to the laws of Eng-

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former subdivision, and enjoy constitutions more or less modelled on our own, the particular details of which are enumerated in Clark's Col. Law, 27—67. The colonies which, having received no constitution creating a local legislature, are still subject to the legislation of the king in council, are St. Lucia, Trinidad and British Guiana, and the Mauritius and other colonies enumerated in Mr. Clark's work, p. 18. These, however, retain the laws in force at the time of their cession to this country. Thus St. Lucia retains the code de la Martinique, or the ordinances promulgated by the French monarchs to their West Indian colonies; Trinidad retains the law of the Spanish colonies as it stood in 1797; British Guiana, the Cape of Good Hope, and Ceylon retains the Roman Dutch colonial law; and in Mauritius are received four of the codes of Napoleon, the fifth or penal code not having been promulgated at the time of its conquest.

The second of the above-named classes includes Newfoundland, and the Australian colonies, viz., the settlements in New South Wales, South and Western Australia, Van Dieman's Land, and New Zealand. These, having been acquired by discovery or simple occupancy, are not subject to the legislation of the crown, but are governed by the general law of England, as it existed when the colony was first established, together with such regulations as have been since specially provided for them by the British legislature. (Clark's Col. Law. 21).

(24) Such were Pennsylvania, New Jersey, and Maryland; Barbadoes, which was formerly granted to the Earl of Carlisle, and St. Lucia to the Duke of Montague, might formerly have been included in this class.

(25) Virginia and all the other American colonies, except Pennsylvania, New Jersey, and Maryland, were of this class. Sierra Leone is a colony which ought perhaps to be designated as a charter government, for in point of form its constitution is established by charter, and not by the commission to its governor. It is the only colony of this class now belonging to us.

land; and with such rights and authorities as are specially given them in their several charters of incorporation. The form of government in most of them is borrowed from that of England. They have a governor named by the king (or in some proprietary colonies by the proprietor), who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king and council here in England. Their general assemblies, which are their house of commons, together with their council of state, being their upper house, with the concurrence of the king, or his representative the governor, make laws suited to their own emergencies [26]. But it is particularly declared by statute 7 and 8 Wm. III. c. 22 [27], that all laws, bye-laws, usages, and customs, which shall be in practice in any of the plantations, repugnant to any law made or to be made in this kingdom relative to the said plantation, shall be utterly void and of none effect. And, because several of the colonies had claimed a sole and exclusive right of imposing taxes upon themselves, the statute 6 Geo. III. c. 12, expressly declares, that all his majesty's colonies and plantations in America have been, are, and of right ought to be, subordinate to and dependent upon the imperial crown and parliament of Great Britain; who have full power and authority to make laws and statutes of sufficient validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever. And this authority has been since very forcibly exemplified, and carried into act, by the statute 7 Geo. III. c. 59, for suspending the legislation of New York; and by several subsequent statutes [28].

The government and judicature of colonies.

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(26) These are generally passed by the colonial legislature without any clause suspending their operation until the royal will be ascertained, and they therefore come into operation in the colony immediately on receiving the governor's assent, and so continue until notice is given of their having been disallowed by the sovereign in council.

(27) Repealed by 6 Geo. 4, c. 105, but re-enacted by 3 & 4 Wm. 4, c. 59, s. 56.

(28) These statutes gave rise to the first American war. The celebrated Declaratory Act, (18 Geo. 3, c. 12), in which the parliament of the mother country declared that they would not impose internal taxes for the purposes of revenue, introduced an exception to the rule laid down by Blackstone. That statute came too late to appease or retain the colonies, who were by the

These are the several parts of the dominions of the crown of Great Britain, in which the municipal laws of England are not of force or authority, merely as the municipal laws of England [29]. Most of them have probably copied the spirit of their own law from this original; but then it receives its obligation, and authoritative force, from being the law of the country.

Foreign possessions of the king; as Hanover, &c.

As to any foreign dominions which may belong to the person of the king by hereditary descent, by purchase or other acquisition, as the territory of Hanover, and his majesty's other property in Germany; as these do not in any wise appertain to the crown of these kingdoms, they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever. The English legislature had wisely remarked the inconveniences that had formerly resulted from dominions on the continent of Europe; from the Norman territory which William the Conqueror brought with him, and held in conjunction with the English throne; and from Anjou, and its appendages, which fell to Henry the Second by hereditary descent. They had seen the nation engaged for near four hundred years together in ruinous wars for defence of these foreign dominions; till, happily for this country, they [30] were lost under the reign of Henry the Sixth. They observed that, from that time, the maritime interests of England were
[111] better understood and more closely pursued: that, in consequence of this attention, the nation, as soon as she had rested from her civil wars, began at this period to flourish all at once; and became much more considerable in Europe than when her princes were possessed of a larger territory, and her councils distracted by foreign interests. This experience

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treaty of Paris, acknowledged to be "free, sovereign, and independent," Sept. 3rd, 1783. See 22 Geo. 3, c. 46; 23 Geo. 3, c. 39. And also see the preamble of 31 Geo. 3, c. 31, s. 46.

(29) In our possessions in the East Indies, the supreme authorities are a governor-general and council, to whom has been entrusted, by a recent act, 3 & 4 Wm. 4, c. 85, s. 43, power to make laws for all persons, whether natives or British subjects, subject nevertheless to the control of the court of directors, and of the parliament at home, by whom such laws may be disallowed.

(30) Except Calais, which remained in our possession until 1558.

and these considerations gave birth to a conditional clause in the act [o] of settlement, which vested the crown in his present majesty's illustrious house, "that in case the crown and imperial dignity of this realm shall hereafter come to any person not being a native of this kingdom of England, this nation shall not be obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of England, without consent of parliament."

England, including Wales and Berwick upon-Tweed.

We come now to consider the kingdom of England in particular, the direct and immediate subject of those laws, concerning which we are to treat in the ensuing Commentaries. And this comprehends not only Wales and Berwick, of which enough has been already said, but also part of the sea. The main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction, as will be shewn hereafter; but they are not subject to the common law [p]. This main sea begins at the low-water-mark. But between the high-water-mark, and the low-water-mark, where the sea ebbs and flows, the common law and the admiralty have *divisum imperium*, and alternate jurisdiction; one upon the water, when it is full-sea; and the other upon land, when it is an ebb [q].

The two modes of division.

The territory of England is liable to two divisions: the one ecclesiastical, the other civil.

1. Ecclesiastical division into provinces, dioceses, archdeaconries, rural deaneries, and parishes.

1. The ecclesiastical division [31] is, primarily, into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops; whereof Canterbury includes twenty-one, and York three: besides the bishoprick of the isle of Man, which was annexed to the province of York by king Henry VIII. Every diocese is divided into archdeaconries, whereof they are sixty in all; each archdeaconry into rural deaneries, which are the circuit

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[o] Stat. 12 & 13 Wm. III. c. 2.
[p] Co. Litt. 260.
[q] Finch. L. 78.

(31) Under the authority of 6 & 7 Wm. 4, c. 77, various orders in council have been issued for the improvement of ecclesiastical divisions in England, and more convenient apportionment of ecclesiastical duties. See 1 & 2 Vict. c. 30; 2 & 3 Vict. c. 55. The subdivision of parishes authorized by the church building acts has no secular effect. See 58 Geo. 3, c. 45, s. 31.

of the archdeacon's and rural dean's jurisdiction, of whom hereafter; and every deanery is divided into parishes [r].

Parishes.

A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein. These districts are computed to be near ten thousand in number [s]. How ancient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that in the early ages of Christianity in this island, parishes were unknown, or at least signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion [t].

Mr. Camden [u] says, England was divided into parishes by archbishop Honorius about the year 630. Sir Henry Hobart [w] lays it down, that parishes were first erected by the council of Lateran, which was held A.D. 1179. Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shewn [x], that the clergy lived in common without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran, to which they are ascribed by Hobart.

[113] We find the distinction of parishes, nay even of mother-churches, so early as in the laws of king Edgar, about the year 970. Before that time the consecration of tithes was in general *arbitrary*; that is, every man paid his own (as was before observed) to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them; it was

[r] Co. Litt. 94.
[s] Camden's Britannia.
[t] Seld. of Tith. 9, 4; 2 Inst. 646; Hob. 296.
[u] In his Britannia.
[w] Hob. 296.
[x] Of Tithes, c. 9

now ordered by the law of king Edgar[y] that "*dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet.*" However if any thane, or great lord, had a church within his own demesnes, distinct from the mother-church, in the nature of a private chapel; then, provided such church had a cœmitery or consecrated place of burial belonging to it, he might allot one third of his tithes for the maintenance of the officiating minister: but if it had no cœmitery, the thane must himself have maintained his chaplain by some other means; for in such case *all* his tithes were ordained to be paid to the *primariæ ecclesiæ*, or mother-church[z].

This proves that the kingdom was then generally divided into parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors: since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as christianity spread itself, began to build churches upon their own demesnes, or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general: and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. Which will well enough [114] account for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the

[y] Seld. of Tith. c. 1.

[z] Ibid. c. 2. See also the laws of king Canute, c. 11, about the year 1030.

hands of irreligious [32] and careless owners, or were situate in forests and desart places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extraparochial; and their tithes are now by immemorial custom payable to the king instead of the bishop, in trust and confidence that he will distribute them for the general good of the church [a]: yet extraparochial wastes and marshlands, when improved and drained, are by the statute 17 Geo. II. c. 37, to be assessed to all parochial rates in the parish next adjoining. And thus much for the ecclesiastical division of this kingdom.

Civil division.

2. The civil division of the territory of England is into counties, of those counties into hundreds, of those hundreds into tithings or towns. Which division, as it now stands, seems to owe its original to king Alfred: who, to prevent the rapines and disorders which formerly prevailed in the realm, instituted tithings; so called from the Saxon, because *ten* freeholders with their families composed one. These all dwelt together, and were sureties or free pledges to the king for the good behaviour of each other; and if any offence was committed in their district, they were bound to have the offender forthcoming [b] [33]. And therefore anciently no man was suffered to abide in England above forty days, unless he were enrolled in some tithings or decennary [c]. One of the prin-

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cipal inhabitants of the tithing is annually appointed to preside over the rest, being called the tithing-man, the headborough (words which speak their own etymology), and in some counties the borsholder, or borough's-ealder, being supposed the discreetest man in the borough, town, or tithing [d].

[a] 2 Inst. 647; 2 Rep. 44; Cro. Eliz. 512.

[b] Flet. 1, 47. This the laws of king Edward the Confessor, c. 20, very justly entitled, "*summa et maxima securitas, per quam omnes statu firmissimo sustinentur: quæ hoc modo fiebat, quod sub decennali fidejussione debebant esse universi*," &c.

[c] Mirr. c. 1, § 3.

[d] Finch. L. 8.

(32) On the contrary, many extra-parochial places appear to have been the sites of religious houses, and others of royal palaces. (Vide Pop. Abst. (1831), vol. i. p. xxii.)

(33) Mr. Hallam thinks that the original institution of this much discussed part of our Anglo-Saxon polity has been erroneously ascribed to Alfred. (Mid. Ag. ii. 401).

Tithings, towns, or vills, are of the same signification in law; and are said to have had, each of them, originally a church and celebration of divine service, sacraments, and burials[e]: though that seems to be rather an ecclesiastical, than a civil distinction. The word *town* or *vill* is indeed, by the alteration of times and language, now become a generical term, comprehending under it the several species of cities, boroughs, and common towns. A city is a town incorporated, which is or hath been the see of a bishop: and though the bishoprick be dissolved, as at Westminster, yet still it remaineth a city[f 34]. A *borough* is now understood to be a town, either corporate or not, that sendeth burgesses to parliament[g]. Other towns there are, to the number, sir Edward Coke says[h], of 8803, which are neither cities nor boroughs; some of which have the privileges of markets, and others not; but both are equally towns in law. To several of these towns there are small appendages belonging, called hamlets; which are taken notice of in the statute of Exeter[i], which makes frequent mention of entire vills, demi-vills, and hamlets. Entire vills sir Henry Spelman[k] conjectures to have consisted of ten freemen or frank-pledges, demi-vills of five, and hamlets of less than five. These little collections of houses are sometimes under the same administration as the town itself, sometimes governed by separate officers; in which last case they are, to some purposes in law, looked upon as distinct townships. These towns, as was before hinted, contained each originally but one parish, and one tithing; though many of them now, by the increase of inhabitants, are divided into several parishes and tithings; and, sometimes, where there is but one parish there are two or more vills or tithings.

Tithings, towns, or vills.

Cities.

Boroughs.

Towns.

Hamlets.

[116]

As ten families of freeholders made up a town or tithing,

Hundreds.

[e] 1 Inst. 115.
[f] Co. Litt. 109.
[g] Litt. § 164.
[h] 1 Inst. 116.
[i] 14 Edw. I.
[k] Gloss. 274.

(34) At the great council, assembled A. D. 1072, to settle the claim of precedence between the archbishops of Canterbury and York, it was decreed that all bishop's sees should be transferred from towns to cities, (Woodd. Lect. i. 302; Co. Lit. 109; Harg. n. 3); consequently there was no original, and is now no necessary, connection between sees and cities. The bishoprick of Ripon has also been restored without elevating that town into the rank of cities. Leicester, Shrewsbury, and other places in which no episcopal jurisdiction ever existed, are styled cities in Domesday; still further proof, if any were necessary, that there is no connection between sees and cities.

so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by an high constable or bailiff, and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes[l].

The subdivisions of hundreds into tithings seems to be most peculiarly the invention of Alfred: the institution of hundreds themselves he rather introduced than invented. For they seem to have obtained in Denmark[m]: and we find that in France a regulation of this sort was made about two hundred years before; set on foot by Clotharius and Childebert, with a view of obliging each district to answer for the robberies committed in its own division. These divisions were, in that country, as well military as civil: and each contained a hundred freemen, who were subject to an officer called the *centenarius*; a number of which *centenarii* were themselves subject to a superior officer called the count or *comes*[n]. And indeed something like this institution of hundreds may be traced back as far as the ancient Germans, from whom were derived both the Franks who became masters of Gaul, and the Saxons who settled in England: for both the thing and the name, as a territorial assemblage of persons, from which afterwards the territory itself might probably receive its denomination, were well known to that warlike people. "*Centeni ex singulis pagis sunt idque ipsum inter suos vocantur; et quod primo numerus fuit, jam nomen et honor est*[o]".

Counties. An indefinite number of these hundreds make up a *county* or shire. Shire is a Saxon word signifying a division; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks; that is, the earl, or alderman (as the Saxons [117] called him) of the shire, to whom the government of it was intrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve, or shire-reeve, signifying the officer of the shire; upon whom, by process of time, the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds, as lathes in Kent, and

[l] Seld. in Fortesc. c. 24.
[m] Seld. tit. of Honour, 2, 5, 3.
[n] Montesq. Sp. L. 30, 17.
[o] Tacit. de mor. Germ. 6.

rapes in Sussex, each of them containing about three or four hundreds apiece. These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into *three* of these intermediate jurisdictions, they are called trithings[p], which were anciently governed by a trithing-reeve. These trithings still subsist in the large county of York, where by an easy corruption they are denominated ridings; the north, the east, and the west-riding. The number of counties in England and Wales have been different at different times: at present they are forty in England, and twelve in Wales.

Counties palatine.

Three of these counties, Chester, Durham, and Lancaster, are called counties palatine. The two former are such by prescription, or immemorial custom; or, at least, as old as the Norman conquest[q]: the latter was created by king Edward III. in favour of Henry Plantagenet, first earl and then duke of Lancaster[r]; whose heiress being married to John of Gant the king's son, the franchise was greatly enlarged and confirmed in parliament[s], to honour John of Gant himself, whom, on the death of his father-in-law, the king had also created duke of Lancaster[t]. Counties palatine are so called *a palatio*; because the owners thereof (the earl of Chester, the bishop of Durham, and the duke of Lancaster,) had in those counties *jura regalia*, as fully as the king hath it in his palace; *regalem potestatem in omnibus*, as Bracton expresses it[u]. They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace[35]; all writs and indictments ran in their names, as in other counties [118] in the king's; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis*[w]. And indeed by the ancient law, in all peculiar juris-

[p] LL. Edw. c. 34.
[q] Seld. tit. Honour, 2, 5, 8.
[r] Pat. 25 Edw. III., p. 1, m. 18: Seld. ibid.; Sandford's Gen. Hist. 112; 4 Inst. 204.
[s] Cart. 36 Edw. III., n. 9.
[t] Pat. 51 Edw. III., m. 33; Plowd. 215; 7 Rym. 138.
[u] L. 3, c. 8, § 4.
[w] 4 Inst. 204.

(35) The right of the Duke of Lancaster to appoint coroners under the charter creating the duchy of Lancaster, and other points in the construction of this charter, have been recently considered in the case of *Jewison* v. *Dyson*, 9 M. & W. 540. The case in Plowden, referred to by Blackstone, contains all the old learning relating to this duchy.

dictions, offences were said to be done against his peace in whose court they were tried: in a courtleet, *contra pacem domini;* in the court of a corporation, *contra pacem ballivorum;* in the sheriff's court or tourn, *contra pacem vicecomitis* [x]. These palatine privileges (so similar to the regal independent jurisdictions usurped by the great barons on the continent, during the weak and infant state of the first feodal kingdoms in Europe [y]) were in all probability originally granted to the counties of Chester and Durham, because they bordered upon inimical countries, Wales and Scotland: in order that the inhabitants, having justice administered at home, might not be obliged to go out of the country, and leave it open to the enemy's incursions; and that the owners, being encouraged by so large an authority, might be the more watchful in its defence. And upon this account also there were formerly two other counties palatine, Pembrokeshire and Hexhamshire; the latter now united with Northumberland: but these were abolished by parliament, the former in 27 Hen. VIII., the latter in 14 Eliz. And in 27 Hen. VIII., likewise, the powers before mentioned of owners of counties palatine were abridged; the reason for their continuance in a manner ceasing: though still all writs are witnessed in their names, and all forfeitures for treason by the common law accrue to them [z] [36].

Of these three, the county of Durham is now the only one [37] remaining in the hands of a subject. For the earldom of Chester, as Camden testifies, was united to the crown by Henry III., and has ever since given title to the king's eldest son. And the county palatine, or duchy, of Lancaster, was the property of Henry Bolingbroke, the son of John of Gant, at the time when he wrested the crown from king Richard II.,

[x] Seld. in Heng. Magn. c. 2. [y] Robertson, Ch. V. i. 60.
[z] 4 Inst. 205.

(36) The proceedings and practice of the courts of this duchy were assimilated to those of the courts at Westminster by 4 & 5 Wm. 4, c. 62; and a similar act has been passed for the courts of the county palatine of Durham, 2 Vict. c. 16. Those of the county palatine of Chester had been previously abolished by the statute of the 11 Geo. 4, and 1 Wm. 4, c. 70, ss. 13, 14.

(37) This has been recently vested in the crown by 6 & 7 Wm. 4, c. 19. It previously belonged to the bishop of Durham for the time being.

and assumed the title of king Henry IV. But he was too prudent to suffer this to be united to the crown; lest, if he [119] lost one, he should lose the other also. For, as Plowden [a] and sir Edward Coke [b] observe, "he knew he had the duchy of Lancaster by sure and indefeasible title, but that his title to the crown was not so assured: for that after the decease of Richard II., the right of the crown was in the heir of Lionel duke of Clarence, *second* son of Edward III.; John of Gant, father to this Henry IV., being but the *fourth* son." And therefore he procured an act of parliament, in the first year of his reign, ordaining that the duchy of Lancaster, and all other his hereditary estates, with all their royalties, and franchises, should remain to him and his heirs for ever; and should remain, descend, be administered, and governed, in like manner as if he never had attained the regal dignity; and thus they descended to his son and grandson, Henry V. and Henry VI., many new territories and privileges being annexed to the duchy by the former [c]. Henry VI. being attainted in 1 Edw. IV., this duchy was declared in parliament to have become forfeited to the crown [d], and at the same time an act was made to incorporate the duchy of Lancaster, to continue the county palatine (which might otherwise have determined by the attainder [e]) and to make the same parcel of the duchy: and, farther, to vest the whole in king Edward IV. and his heirs, *kings of England*, for ever; but under a separate guiding and governance from the other inheritances of the crown. And in 1 Hen. VII. another act was made, to resume such part of the duchy lands as had been dismembered from it in the reign of Edward IV., and to vest the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form and condition, separate from the crown of England and possession of the same, as the three Henries and Edward IV., or any of them, had and held the same [f].

[a] 215.

[b] 4 Inst. 205.

[c] Parl. 2 Hen. V., n. 30; 3 Hen. V., n. 15.

[d] 1 Ventr. 155.

[e] 1 Ventr. 157.

[f] Some have entertained an opinion (Plowd. 220, 1, 2; Lamb. *Archeion*, 233; 4 Inst. 206), that by this act the right of the duchy vested only in the *natural*, and not in the *political* person of king Henry VII., as formerly in that of Henry IV.; and was descendible to his natural heirs, independent of the succession to the crown. And if this notion were well founded,

The isle of Ely.

The isle of Ely is not a county palatine, though sometimes erroneously called so, but only a royal franchise: the bishop having by grant of king Henry the First, *jura regalia* within the isle of Ely; whereby he exercises a jurisdiction over all causes, as well criminal as civil [g] [38].

Counties corporate.

There are also counties corporate: which are certain cities and towns, some with more, some with less territory annexed to them; to which out of special grace and favour the kings of England have granted the privilege to be counties of themselves, and not to be comprised in any other county; but to be governed by their own sheriffs [39] and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, Norwich, Coventry, and many others [40]. And thus much of the countries subject to the laws of England.

it might have become a very curious question at the time of the Revolution in 1688, in whom the right of the duchy remained after king James's abdication, and previous to the attainder of the pretended prince of Wales. But it is observable, that in the same act, the duchy of Cornwall is also vested in king Henry VII. and his heirs; which could never be intended in any event to be separated from the inheritance of the crown. And indeed it seems to have been understood very early after the statute of Henry VII., that the duchy of Lancaster was by no means thereby made a separate inheritance from the rest of the royal patrimony; since it descended with the crown to the half-blood in the instances of queen Mary and queen Elizabeth: which it could not have done, as the estate of a mere duke of Lancaster, in the common course of legal descent. The better opinion, therefore, seems to be that of those judges, who held (Plowd. 221), that notwithstanding the statute of Henry VII. (which was only an act of resumption) the duchy still remained as established by the act of Edward IV.; separate from the other possessions of the crown in order and government, but united in point of inheritance.

[g] 4 Inst. 220.

(38) See *Grant* v. *Bagge*, 3 East, 128. But by 6 & 7 Wm. 4, c. 87, this jurisdiction has been entirely taken from the bishop, and is now vested in the crown.

(39) 5 & 6 Wm. 4, c. 76, s. 61.

(40) Which are enumerated in 3 Geo. 1, c. 15; but see 5 & 6 Wm. 4, c. 76, ss. 61, 109.

COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK THE FIRST.

OF THE RIGHTS OF PERSONS.

CHAPTER I.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

THE objects of the laws of England are so very numerous and extensive, that in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other; both of which are equally productive of confusion.

Now, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; or as Cicero [a], and after him our Bracton [b], have expressed it *sanctio justa, jubens honesta et prohibens contraria;* it follows, that the primary and principal objects of the law are RIGHTS and WRONGS. In the prosecution therefore of these Commentaries, I shall follow this very simple and obvious division; and shall in the first place consider the *rights* that are com- [122]

[a] 11 Philipp. 12. [b] l. 1, c. 3.

manded, and secondly the *wrongs* that are forbidden by the laws of England.

Rights; respect 1. persons or 2. things.

Rights are however liable to another subdivision; being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum* or the *rights of persons;* or they are, secondly, such as a man may acquire over external objects or things unconnected with his person, which are styled *jura rerûm* or the *rights of things.*

Wrongs are 1. private or 2. public.

Wrongs also are divisible into, first, *private wrongs,* which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly, *public wrongs,* which being a breach of general and public rights, affect the whole community, and are called crimes and misdemesnors[1].

The object of the laws of England falling into this fourfold division, the present Commentaries will therefore consist of the four following parts: 1. *The rights of persons;* with the means whereby such rights may be either acquired or lost. 2. *The rights of things;* with the means also of acquiring and losing them. 3. *Private wrongs,* or civil injuries; with the means of redressing them by law. 4. *Public wrongs,* or crimes and misdemesnors; with the means of prevention and punishment.

1. Rights respecting persons;

We are now, first to consider the *rights of persons;* with the means of acquiring and losing them.

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division of such rights.

Now the rights of persons that are commanded to be observed by the municipal law are of two sorts: first, such as are due *from* every citizen, which are usually called civil *duties;* and, secondly, such as belong to him, which is the more popular acceptation of *rights* or *jura.* Both may indeed be comprised in this latter division; for, as all social duties are of a relative nature, at the same time that they are due

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(1) The division of *wrongs* into *public* and *private,* is much more intelligible and accurate than that of *rights* into those of *things* or property, and those of *persons.* By rights of persons, are meant the rights of members of society *inter se* in certain social relations independent of things; and by rights of things, the rights of members of society to and affecting things, and in certain social relations wholly relating to and arising out of things. This classification has been adopted from Lord C. J. Hale, (see Hale's Analysis of the Law), who introduced it into our system from the Institutes. It has also been adopted into the code civil of France, and the codes of other countries.

from one man, or set of men, they must also be due *to* another. But I apprehend it will be more clear and easy, to consider many of them as duties required from, rather than as rights belonging to, particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are, reciprocally, the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.

Persons also are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

Persons are natural or artificial.

The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

The rights of natural persons are absolute or relative.

By the absolute *rights* of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties*, which man is bound to perform, considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself (as drunkenness, or the like), they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them.

Absolute rights.

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Here the circumstances of publication is what alters the nature of the case. *Public* sobriety is a relative duty, and therefore enjoined by our laws; *private* sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction. But with respect to *rights*, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principal view of human law is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which
[125] in themselves are few and simple; and then such rights as are relative, which, arising from a variety of connexions, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security.

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or controul, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he

endued him with the faculty of free-will. But every man, when he enters into society, gives up a part of his natural liberty as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man that considers a moment would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public [c] [2]. Hence we may

Political or civil liberty.

[c] *Facultas ejus, quod cuique facere libet, nisi quid vi aut jure prohibetur.* Inst. i. 3, 1.

(2) And by way of compensation for that degree of natural freedom which every man thus sacrifices when he enters into a social community, human laws confer upon him many civil rights which he would not otherwise possess. (Vide infra, p. 299.) It must be confessed that Blackstone no where ventures on an accurate and full description of civil freedom; and even by combining his remarks upon it, we obtain no very definite notions of its real nature. He has already, (supra, p. 6), said that it consists in "the power of doing whatever the laws permit." Here its essence is said to be this, that natural liberty be not restrained, except for the general advantage of the public. And subsequently (p. 251,) he says, that "civil liberty consists in protecting the rights of individuals by the united force of society." Philosophers and statesmen, however, generally furnish us with more correct and practical views of the true nature of civil liberty than lawyers. "Abstract liberty," says Mr. Burke, "is not to be found. Liberty resides in some sensible object; and every nation has formed to itself some favourite point, which by way of eminence becomes the criterion of their happiness. — Social and civil freedom, like all other things in common life, are variously mixed and modified, enjoyed in very different degrees, and shaped into an infinite diversity of forms, according to the temper and circumstances of every community. The extreme of liberty, (which is its abstract perfection, but its real fault,) obtains no where, nor ought to obtain anywhere. Because extremes, in every point which relates either to our duties or satisfactions in life, are destructive both to virtue and enjoyment. Liberty too must be limited in order to be possessed. The degree of restraint it is impossible in any case to settle precisely. But it ought to be the constant aim of every wise public council to find out, by cautious experiments and rational cool endeavours, with how little, not how much, of this restraint,

[126] collect that the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny: nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty: whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society, which alone can secure our independence. Thus the statute of king Edward IV. [d], which forbad the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of king Charles II. [e], which prescribes a thing seemingly as indifferent (a dress for the dead, who are all ordered to be buried in woollen), is a law consistent with public liberty; for it encourages the staple trade, on which in great measure depends the universal good of the nation. So that laws, when prudently framed,

[d] 3 Edw. IV. c. 5.

[e] 30 Car. II. st. 1, c. 3, (repealed by 54 Geo. III. c. 108.)

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the community can subsist. For liberty is a good to be improved, and not an evil to be lessened. It is not only a private blessing of the first order, but the vital spring or energy of the state itself, which has just so much life and vigour as there is liberty in it." (Works, iii. 49, 185).

Mr. Locke's description of civil liberty is generally considered the best, and it certainly embodies all the essentials of English liberty. "The liberty of man in society is to be under no other legislative power, but that established by consent in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislature shall enact, according to the trust put in it. Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man." (On Gov. ii. c. 4).

are by no means subversive but rather introductive of liberty; for (as Mr. Locke has well observed [f]) where there is no law there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject. Very differently from the modern constitutions of other states on the continent of Europe, and from the genius of the imperial law; which in general are calculated to vest an arbitrary and despotic power of controlling the actions of the subject, in the prince, or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a free man [g]; though the master's right to his service may *possibly* still continue [3].

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On the English liberties.

The absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties), as they are founded on nature and reason, so they are coeval with our form of government; though subject at

[f] On Gov. p. 2, § 57.

[g] Salk. 666. See ch. 14.

(3) By the case of the negro *Somerset*, (St. Tr. xx. 79), and that of *Forbes* v. *Cochrane*, (2 B. & C. 448), this great principle of English law was declared to extend somewhat beyond the limits laid down by Blackstone. The former case established not only that slaves, when brought into England, become free, but that when seized and imprisoned on board a ship, with a view to be again enslaved, they are entitled equally with any other British subject to a writ of *habeas corpus* to restore them to freedom. In *Forbes* v. *Cochrane*, it was held that the master of slaves, who had escaped from slavery in East Florida, where slavery was lawful, could maintain no action in our courts against a British subject who had harboured them after their escape. "The moment," said C. J. Best, "they put their feet on board of a British man-of-war, not being within the waters of East Florida, (where undoubtedly the laws of that country would prevail), those persons, who before had been slaves, are free."

times to fluctuate and change: their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

On the charters of our liberties.

First, by the great charter of liberties, which was obtained, sword in hand, from king John, and afterwards, with some alterations, confirmed in parliament by king Henry the Third, his son. Which charter contained very few new grants; but, as sir Edward Coke [h] observes, was for the most part declaratory of the principal grounds of the fundamental laws of
[128] England. Afterwards by the statute called *confirmatio cartarum* [i], whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes (sir Edward Coke, I think, reckons thirty-two [k]), from the first Edward to Henry the Fourth. Then, after a long interval, by *the petition of right;* which was a parliamentary declaration of the liberties of the people, assented to by king Charles the First in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the *habeas corpus* act, passed under Charles the Second. To these succeeded *the bill of rights*, or declaration delivered by the lords and commons to the prince and princess of Orange 13 February 1688; and afterwards enacted in parliament when they became king

[h] 2 Inst. proëm. [i] 25 Edw. I.
[k] 2 Inst. proëm.

and queen: which declaration concludes in these remarkable words; "and they do claim, demand, and insist upon, all and singular the premises, as their undoubted rights and liberties." And the act of parliament itself[l] recognizes "all and singular the rights and liberties asserted and claimed in the said declaration to be the true, ancient, and indubitable rights of the people of this kingdom." Lastly, these liberties were again asserted at the commencement of the present century, in the *act of settlement*[m], whereby the crown was limited to his present majesty's illustrious house: and some new provisions were added, at the same fortunate era, for better securing our religion, laws, and liberties; which the statute declares to be "the birthright of the people of England," according to the ancient doctrine of the common law[n].

Thus much for the *declaration* of our rights and liberties. [129] The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These therefore were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property: because, as there is no other known method of compulsion, or of abridging man's natural free-will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

I. The right of personal security consists in a person's legal

I. Right of personal security.

[l] 1 W. & M. st. 2, c. 2. [m] 12 & 13 W. III. c. 2.
[n] Plowd. 55.

and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life.

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or, if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter [o]. But the modern law doth
[130] not look upon this offence in quite so atrocious a light, but merely as a heinous misdemesnor [p] (4).

An infant in *ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it [q]; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born [r] (5). And in this point the civil law agrees with ours [s].

[o] "*Si sit aliquis qui mulierem pregnantem percusserit, vel ei venenum dederit, per quod fecerit abortivam: si puerperium jam formatum vel animatum fuerit, et maxime si fuerit animatum, facit homicidium.*" Bracton, l. 3, tr. 2, c. 4.

[p] 3 Inst. 50.

[q] Stat. 12 Car. II. c. 24.

[r] Stat. 10 and 11 Wm. III. c. 16.

[s] *Qui in utero sunt, in toto pæné jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur.* Ff. 1, 5. 26.

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(4) This offence is now felony, and is punishable by transportation for fifteen years or imprisonment for three years. (7 Wm. 4, and 1 Vict. c. 85, s. 6). It was formerly a capital offence under 43 Geo. 3, c. 58.

(5) A child *in ventre* is now considered for all beneficial purposes in the same light as if actually born; (4 Ves. 227; 2 V. & B. 367); except in taking lands by descent. There the presumptive heir may enter and receive the rents and profits to his own use until the birth of the child. (3 Wils. 526). Posthumous children are entitled, even with the half-blood, (1 Vez. 156), to a share of portions for children bequeathed under a power, (1 P. Wms. 244), or of the personal estate of an intestate distributable under the statute, (2 Atk. 115); or under the custom of London. (Prec. Cha. 499). They are also entitled under a devise or bequest to "children born in the lifetime." (2 H. Bl. 399; 2 B. C. C. 320; 2 Ves. 673; 1 S. & S. 181). And a posthumous tenant in tail is entitled to the rents and profits from the death of the tenant for life. (3 Atk. 203). The life of a posthumous child is also a life *in esse* in the rule against perpetuities, (7 T. R. 100); and may therefore be made the limit for postponing the vesting of an executory devise, (3 Ves. 486; 4 Ves.

2. A man's limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty. 2. Limbs.

Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance [t]. And the same is also a sufficient excuse for the commission of many misdemesnor, as will appear in the fourth book. The constraint a man is under in these circumstances is called in law *duress*, from the Latin *durities*, of which there are two sorts; duress of imprisonment, where a man actually [131]. loses his liberty, of which we shall presently speak; and duress *per minas*, where the hardship is only threatened and On duress. impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason; "*non*," as Bracton expresses it, "*suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum* [u]." A fear of battery, or being beaten, though never so well grounded [6] is

[t] 2 Inst. 483.

[u] l. 2, c. 5.

227; 11 Ves. 112; 1 N. R. 357); or for the duration of a trust for accumulation subject to the Thellusson Act, (39 & 40 Geo. III. c. 98); and that either for the benefit of the infant or of other parties.

(6) There is a wide legal distinction between threats which a man of common firmness and prudence may, and threats which he may not, be expected to resist. (See Co. Litt. 162 a, 253 b; 6 East, 126; 2 Leach, C. C. 774).

no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages[w]: but no suitable atonement can be made for the loss of life, or limb. And the indulgence shewn to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with that maxim of the civil law; *ignoscitur ei qui sanguinem suum qualiter qualiter redemptum voluit*[x].

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessaries of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, of which in their proper places. A humane provision; yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the emperor Constantine commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our foundling hospitals, though comprised in the Theodosian code[y], were rejected in Justinian's collection.

[132] These rights, of life and member, can only be determined by the death of the person; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was banished or abjured[7] the realm[z] by the process of the common law, or entered into religion; that is, went into a monastery, and became there a monk professed: in which cases he was absolutely dead in law, and his next heir should have his estate. For such banished man was entirely cut off from society; and such a monk, upon

On civil death.

[w] 2 Inst. 483.
[x] Ff. 48, 21, 1.
[y] l. 11, t. 27.
[z] Co. Litt. 133.

(7) To abjure the realm is a civil death, because it is to leave the realm *for ever*; and so if a man be attainted of treason or felony, and saving his life, is banished for ever, this also is a civil death. But if a man, by act of parliament, be exiled but for a time, which some call a relegation, that is no civil death. (Co. Litt. 133 a).

his profession, renounced solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations [a]. A monk was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men, make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts, due *to* the religious, and were liable to the same actions for those due *from* him, as if he were naturally deceased [b]. Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors, and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due [c]. In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion: for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's *natural* life [d]. But, even in the times of popery, the law of England [133] took no cognizance of *profession* in any foreign country, because the fact could not be tried in our courts [e]; and therefore, since the Reformation, this disability is held to be abolished [f]: as is also the disability of banishment, consequent upon abjuration, by statute 21 Jac. I. c. 28.

This natural life, being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority. Yet nevertheless it may,

[a] This was also a rule in the feodal law, l. 2, t. 21, *desiit esse miles seculi, qui factus est miles Christi, nec beneficium pertinet ad eum qui non debet gerere officium.*

[b] Litt. § 200.

[c] Co. Litt. 133.

[d] 2 Rep. 48; Co. Litt. 132.

[e] Co. Litt. 132.

[f] 1 Salk. 162

by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; of the nature, restrictions, expedience, and legality of which, we may hereafter more conveniently inquire in the concluding book of these Commentaries. At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subjects, such constitution is in the highest degree tyrannical: and that whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree: because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity[8]: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "*Nullus liber homo*," says the great charter [g], "*aliquo modo destruatur, nisi per legale judicium parium suorum, aut per legem terræ.*" Which words, "*aliquo modo destruatur*," according to sir Edward Coke [h], include a prohibition not only of *killing and maiming*, but also of *torturing* (to which our laws are strangers), and of every oppression by colour of an illegal authority. And it is enacted by the statute 5 Ed. III. c. 9, that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Ed. III. c. 3, that no man shall be

On criminal punishments.

[134]

[g] c. 29. [h] 2 Inst. 48.

(8) This remark was not justified by our penal code when Blackstone wrote. The common law inflicted death on every felon who could not read; and the long list of enactments, creating innumerable felonies without benefit of clergy, shows that our statute law was still more bloody. Out of one hundred and sixty offences then punishable with death, four-fifths had been made so during the reigns of Geo. 1, Geo. 2, and Geo. 3. (See also Blackstone's own remarks on the disgusting catalogue set forth, vol. iv. 377). The late alterations in our penal code have, however, rendered it more deserving of the learned commentator's encomium than formerly; and comparatively mild as our punishments may now be considered, (see 7 & 8 Geo. 4, cc. 27-32; 9 Geo. 4, c. 31; 1 Vict. cc. 84, 89, 91; 2 & 3 Vict. c. 97; 4 & 5 Vict. c. 56; 5 & 6 Vict. cc. 28 & 51), no evil results appear to have hitherto arisen from it.

put to death, without being brought to answer by due process of law.

3. Besides those limbs and members that may be necessary to a man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member. 3. Body.

4. The preservation of a man's health from such practices as may prejudice or annoy it, and, 4. Health.

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come) it will suffice to have barely mentioned among the rights of persons: referring the more minute discussion of their several branches, to those parts of our Commentaries which treat of the infringement of these rights, under the head of personal wrongs [9]. 5. Reputation.

II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and, that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter [i] is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes [j] expressly II. Right of personal liberty.

[135]

[i] c. 29.

[j] 5 Edw. III. c. 8; 25 Edw. III. st. 5, c. 4; 28 Edw. III. c. 3.

(9) Vide infra, vol. iii. 119-127.

direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I. it is enacted, that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law. By 16 Car. I. c. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas; who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2, commonly called the *habeas corpus act*, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M. st. 2, c. 2, that excessive bail ought not to be required[10].

The habeas corpus act.

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper (as in France it is daily practised by the crown[k]), there would soon be an end of all other rights and immunities. Some have thought, that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of

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[k] I have been assured upon good authority, that, during the mild administration of cardinal Fleury, above 54,000 *lettres de cachet* were issued, upon the single ground of the famous bull *unigenitus*.

(10) See further on the writ of habeas corpus, infra, iii. 129. The provisions of 31 Car. 2, c. 2, were extended to other than criminal matters by 56 Geo. 3, c. 100. The right of personal liberty has recently been further protected by 1 & 2 Vict. c. 110, abolishing arrest for debt on mesne process except in certain cases. On the practice relating to the writ of *habeas corpus* at common law, and under the statute, see the *Canadian prisoners' case*, 9 A. & E. 731.

the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom: but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient: for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus act* for a short and limited time, to imprison suspected persons without giving any reason for so doing; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, ne quid respublica detrimenti capiat,*" was called the *senatus consultum ultimæ necessitatis.* In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever [11].

Suspensions of the habeas corpus act.

The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly

(11) From this passage it might be supposed that when the habeas corpus act is suspended, the crown is authorized to imprison suspected persons without giving any reason for so doing. But this is not the case; the effect of such an act is, (as Mr. J. Coleridge has observed), to prevent persons who are committed upon certain charges from being bailed, tried, or discharged for the time of the suspension, except under the provisions of the suspending act, leaving, however, to the magistrate, or person committing, all the responsibility attending an illegal imprisonment. It is usual, therefore, to pass acts of indemnity subsequently, for the protection of those who either could not defend themselves in an action for false imprisonment without making improper disclosures of the information on which they had acted, or who have done acts not strictly defensible at law, though justified by the necessity of the moment. (See 57 Geo. 3, c. 3, and c. 55, for instances of suspending acts; and 58 Geo. 3, c. 6, for one of an indemnifying act).

detaining him in the street, is an imprisonment[l]. And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond. But if a man be lawfully im-
[137] prisoned, and either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it[m]. To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison[12]; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner[n]. For the law judges in this respect, saith sir Edward Coke, like Festus the Roman governor; that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.

A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ *ne exeat regnum*[13], and prohibit any of his subjects from going into foreign parts without licence[o]. This may be necessary for the public service and safeguard of the commonwealth. But no power on earth, except the authority of parliament can send any subject of England *out of* the land against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the common law; and whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern

On punishment by exile.

[l] 2 Inst. 589.
[m] 2 Inst. 482.
[n] Ibid. 52, 53.
[o] F. N. B. 85.

(12) This must be understood with the qualifications mentioned, infra, vol. iv., c. 21.

(13) On this writ, vide infra, p. 266.

act of parliament[14]. To this purpose the great charter[p] declares that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act 31 Car. II. c. 2, (that second *magna carta* and stable bulwark of our liberties) it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas (where they cannot have the full benefit and protection of the common law); but that all such imprisonment shall be illegal; that the person who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire*, and be capable of receiving the king's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers, and abettors, and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds. [138]

The law is in this respect so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador[q]. For this might in reality be no more than an honourable exile.

[p] c. 29.

[q] 2 Inst. 47.

(14) It is said that exile was first introduced as a punishment by the legislature in the 39th year of Elizabeth, when a statute enacted that "such rogues as were dangerous to the inferior people should be banished the realm." (39 Eliz. c. 4). See Barr. Ant. Stat. 269, and that the first statute in which the word "transportation" is used is 18 Car. 2, c. 3, which gives a power to the judges at their discretion either to execute or transport to America for life the Moss troopers of Cumberland and Northumberland (2 Woodd. 498), a law which very unnecessarily was continued till the 31 Geo. 2, c. 42, and then made perpetual.—[CHRISTIAN.] By 7 Wm. 4, and 1 Vict. c. 90, the law relative to offences punishable by transportation for life has been much amended, and transportation for any term not exceeding fifteen, nor less than ten years, substituted in lieu thereof.

III. Right to private property.

III. The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The origin of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing Commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society: and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter[r] has declared that no freeman shall be disseised, or divested, of his freehold or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes[s] it is enacted, that no man's lands or goods shall be seised into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed, and holden for none.

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On infringements of this right.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every

[r] c. 29.

[s] 5 Edw. III. c. 9; 25 Edw. III. st. 5, c. 4; 28 Edw. III. c. 3.

individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform [15].

Nor is this the only instance in which the law of the land [140]

(15) These observations must be taken with considerable qualification, "For," as observed by Buller, J., (4 T. R. 797), "there are many cases in which individuals sustain an injury for which the law gives no action; for instance: pulling down houses, or raising bulwarks for the preservation and defence of the kingdom against the king's enemies. The civil law writers indeed, say that the individuals who suffer have a right to resort to the public for a satisfaction, but no one ever thought that the common law gave an action against the individual who pulled down the house," &c. And where commissioners appointed by a paving act, damage the property of an individual, without any excess of jurisdiction on their part, the commissioners, or paviors acting under them, are not liable to an action, (4 T. R. 794; 3 Wils. 461; 6 Taunt. 29). In general, however, a power of this nature must be created by statute, by which also provision is made for compensation to individuals.

The subject of stopping and diverting highways, with the right of appeal against orders of justices for so doing, was regulated by 13 Geo. 3, c. 78, until the 55 of Geo. 3, c. 68, was substituted for it. Both acts are now repealed by 5 & 6 Wm. 4, c. 50, and a new system is introduced, under which two justices on application of the vestry, or of the surveyor of a parish, if on behalf of a private party, may view the existing highways, and after giving certain notices may certify that such view has been had; which certificate, after being lodged with the clerk of the peace, together with the plan, &c., required by the act, is directed to be read in open court at the quarter sessions, and enrolled among the records of the quarter sessions, after which the road in question may be stopped up. An appeal is given, and a jury of twelve disinterested men out of the panel returned to serve at the sessions, are to determine whether the new highway is nearer, and more commodious to the public, or whether the old one is unnecessary, or the appellant is injured or aggrieved."—(Dickinson's Quarter Sessions).

The acts for local improvements for railways, canals, &c., of late years so numerous, contain clauses providing compensation to all individuals compelled to part with their land, or otherwise injured by carrying the act into execution.

has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm, or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edw. I. c. 5 and 6, it is provided, that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I. st. 4, c. 1, which [t] enacts, that no talliage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land: and again, by 14 Edw. III. st. 2, c. 1, the prelates, earls, barons, and commons, citizens, burgesses, and merchants shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right 3 Car. I., that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 W. and M. st. 2, c. 2, it is declared, that levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament; or for longer time, or in other manner, than the same is or shall be granted; is illegal.

On the modes of securing the perpetual enjoyment of these rights.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure [141] their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal

[t] See the historical introduction to the great charter, (*edit. Oxon.*) *sub anno* 1297; wherein it is shewn that this statute *de tallagio non concedendo*, supposed to have been made in 34 Edw. I., is in reality nothing more than a sort of translation into Latin of the *confirmatio cartarum*, 25 Edw. I., which was originally published in the Norman language.

security, personal liberty, and private property. These are,

1. The constitution, powers, and privileges of parliament, of which I shall treat at large in the ensuing chapter.

2. The limitation of the king's prerogative, by bounds, so certain and notorious, that it is impossible he should either mistake or legally exceed them without the consent of the people. Of this also I shall treat in its proper place. The former of these keeps the legislative power in due health and vigour, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna carta* [u], spoken in the person of the king, who in judgment of law (says sir Edward Coke [w]) is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam:* "and therefore every subject," continues the same learned author, "for injury done to him *in bonis, in terris, vel persona,* by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to the law of [142] the land: and what that law is, every subject knows, or may know if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. I shall however just mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. It is ordained by *magna carta* [x], that no freeman shall be outlawed, that is put out of the protection and benefit of the

[u] c. 29. [w] 2 Inst. 55. [x] c. 29.

laws, but according to the law of the land. By 2 Edw. III. c. 8, and 11 Ric. II. c. 10, it is enacted, that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right: and, though such commandments should come, the judges shall not cease to do right; which is also made a part of their oath by statute 18 Edw. III. st. 4. And by 1 W. and M. st. 2, c. 2, it is declared, that the pretended power of suspending, or dispensing with laws, or the execution of laws, by regal authority, without consent of parliament, is illegal [16].

Not only the substantial part, or judicial decisions, of the law, but also the formal part or method of proceeding, cannot be altered but by parliament: for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old-established forms of the common law. For which reason it is declared in the statute 16 Car. I. c. 10, upon the dissolution of the court of starchamber, that neither his majesty, nor his privy council, have any jurisdiction, power, or authority by English bill, petition, articles, libel (which were the course of proceeding in the starchamber, borrowed from the civil law), or by any other arbitrary way whatsoever, to examine, or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom;

(16) "This doctrine," says the learned commentator in another place, (infra, p. 342), "which set the prerogative above the laws, was effectually demolished by the Bill of Rights at the Revolution; and abdicated Westminster Hall, when king James abdicated the kingdom." Shortly before the Revolution, it was solemnly discussed in *Hale's case*, (11 St. Tr. 1165—1280; 2 Show. 475), and eleven of the twelve judges held that the king could dispense with the Test Act, imposing penalties for accepting offices without the previous qualification of having received the sacrament in the church of England. They further held that this power was a branch of the king's sovereign prerogative which could not be taken away or restrained by statute. "This unadvised assertion in a court of justice of a principle, which, though not by any means novel, had never before been advanced in a business of such universal concern and interest, may be said to have sealed the condemnation of the house of Stuart. It made the co-existence of an hereditary line, claiming a sovereign prerogative paramount to the liberties they had vouchsafed to concede, incompatible with the security or probable duration of those liberties. This incompatibility is the true basis of the Revolution of 1688." (Hallam. C. H. iii. 87).

but that the same ought to be tried and determined in the ordinary courts of justice, and by *course of law*.

4. If there should happen any uncommon injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. In Russia we are told [y] that the Czar Peter established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition: and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult; as happened in the opening of the memorable parliament in 1640; and, to prevent this, it is provided by the statute 13 Car. II. st. 1, c. 5, that no petition to the king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury, in the country; [17] and in [143]

[y] Montesq. Sp. L. xii. 26.

(17) Which the grand jury may do either at the assizes or sessions. The punishment for an offence against the act, is a fine to any amount not exceeding 100*l*., and imprisonment for three months. At the trial of Lord George Gordon, the whole court, including Lord Mansfield, declared that this statute was not affected by the Bill of Rights, 1 Wm. & M. st. 2, c. 2, (see Doug. 571). But Mr. Dunning, in the House of Commons, contended, "that it was a clear and fundamental point in the constitution of this country, that the people had a right to petition their representatives in parliament, and that it was by no means true that the number of names signed to any such petition was limited. To argue that the act of Charles was now in force, would be as absurd as to pretend that the prerogative of the crown still remained in its full extent notwithstanding the declaration in the Bill of Rights." (See New An. Reg. 1781, vol. 2). And the acknowledged

London by the lord mayor, aldermen, and common council: nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the statute 1 W. & M. st. 2, c. 2, that the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal.

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as
[144] are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2, c. 2, and it is indeed a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression [18].

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties, more generally talked of than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be sup-

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practice has been consistent with this opinion.—[CHITTY.]

See the act for the more effectual suppression of societies established for seditious or treasonable purposes, (39 Geo. 3, c. 79, amended by 57 Geo. 3, c. 19). Meetings of more than fifty persons for the purpose of petitioning the parliament, held within one mile of Westminster Hall are illegal, (57 Geo. 3, c. 19, s. 23). See also 60 Geo. 3, c. 6, now expired.

(18) See the stat. 60 Geo. 3, c. 1 & 2, passed to prevent the training of persons to the use of arms, and authorizing two justices to seize arms which they believe to be in the possession of any persons for dangerous purposes. See also the act for registering arms and regulating the importation, manufacture, and sale of arms, gunpowder, and ammunition in Ireland (6 & 7 Vict. c. 74).

ported in its full vigour; and limits, certainly known, be set to the royal prerogative. And lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints—restraints in themselves so gentle and moderate, as will appear upon farther inquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do everything that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow-citizens. So that this review of our situation may fully justify the observation of a learned French author, who indeed generally both [145] thought and wrote in the spirit of genuine freedom;[z] and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world where political or civil liberty is the direct end of its constitution. Recommending therefore to the students in our laws a farther and more accurate search into this extensive and important title, I shall close my remarks upon it with the expiring wish of the famous father Paul to his country, "ESTO PERPETUA!"

[z] Montesq. Sp. L. xi. 5.

CHAPTER II.

OF THE PARLIAMENT.

We are next to treat of the rights and duties of persons, as they are members of society, and stand in various relations to each other. These relations are either public or private: and we will first consider those that are public.

The most universal public relation, by which men are connected together, is that of government; namely, as governors and governed, or, in other words, as magistrates and people. Of magistrates some also are *supreme*, in whom the sovereign power of the state resides; others are *subordinate*, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere.

In all tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us therefore in England this supreme power is divided
[147] into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone. It will be the business of this chapter to consider the British parliament; in which the

legislative power, and (of course) the supreme and absolute authority of the state, is vested by our constitution.

Of the origin of parliaments.

The original or first institution of parliament is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. The word *parliament*, itself, (*parlement* or *colloquium*, as some of our historians translate it), is comparatively of modern date; derived from the French, and signifying an assembly that met and conferred together. It was first applied to general assemblies of the states under Louis VII. in France, about the middle of the twelfth century[a]. But it is certain that, long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm. A practice, which seems to have been universal among the northern nations, particularly the Germans[b]; and carried by them into all the countries of Europe, which they overran at the dissolution of the Roman empire. Relics of which constitution, under various modifications and changes are still to be met with in the diets of Poland, Germany, and Sweden, and the assembly of the estates in France[c]: for what is there now called the parliament is only the supreme court of justice, consisting of the peers, certain dignified ecclesiastics, and judges; which neither is in practice, nor is supposed to be in theory, a general council of the realm[1].

[a] Mod. Un. Hist. xxiii. 307. The first mention of it in our statute law is in the preamble to the statute of West. 1, 3 Edw. 1, A.D. 1275.

[b] *De minoribus rebus principes consultant, de majoribus omnes.* Tac. de mor. Germ. c. 11.

[c] These were assembled for the last time, A.D. 1561. (See Whitelocke of parl. c. 72), or according to Robertson, A.D. 1614. (Hist. Charles V. i. 369).

(1) The parliaments, the faithful repositories of the laws of France and remembrancers of the ancient rights of the people, and, (when the states-general were no longer summoned), the only check upon the arbitrary edicts of the crown, received their death blow from Mirabeau in the beginning of the French revolution. The thrilling allusion made to this event by Mr. Burke in 1794, in the close of his argument on the impeachment of Warren Hastings, is familiar to every one.

With respect to the states-general of France, mentioned in the note (c), they resumed their functions in May, 1789, after a long lapse of a hundred and seventy-five years. At first they met in two houses, the privileged orders in one, and the tiers etât or representatives of the commons in the other, but the latter in a few weeks assumed the name of the National Assembly of France, and, having been joined by a few of the upper house, acted as if all the nation were concentrated into their body.

With us in England this general council hath been held immemorially, under the several names of *michel-synoth* or great council, *michel-gemote* or great meeting, and more frequently *wittena-gemote* or the meeting of wise men[2]. It was also styled in Latin, *commune concilium regni, magnum concilium regis, curia magna, conventus magnatum vel procerum, assisa generalis,* and sometimes *communitas regni Angliæ*[d]. We have instances of its meeting to order the affairs of the kingdom, to make new laws, and to amend the old, or, as Fleta[e] expresses it, "*novis injuriis emersis nova constituere remedia,*" so early as the reign of Ina king of the West Saxons, Offa king of the Mercians, and Ethelbert king of Kent, in the several realms of the heptarchy. And, after their union, the Mirror[f] informs us, that king Alfred ordained for a perpetual usage, that these councils should meet twice in the year, or oftener, if need be, to treat of the government of God's people; how they should keep themselves from sin, should live in quiet, and should receive right. Our succeeding Saxon and Danish monarchs held frequent councils of this sort, as appears from their respective codes of laws; the titles whereof usually speak them to be enacted, either by the king with the advice of his wittena-gemote or wise men, as, "*hæc sunt instituta, quæ Edgarus rex consilio sapientum suorum instituit*"; or to be enacted by those sages with the advice of the king, "*hæc sunt judicia, quæ sapientes consilio regis Ethelstani instituerunt*"; or lastly, to be enacted by them both together, as, "*hæc sunt institutiones, quas rex Edmundus et episcopi sui cum sapientibus suis instituerunt.*"

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There is also no doubt but these great councils were occasionally held under the first princes of the Norman line[3].

[d] Glanvil. l. 13, c. 32; l. 9, c. 10.—Pref. 9 Rep.—2 Inst. 526.

[e] l. 2, c. 2.

[f] c. 1, s. 3.

(2) It was also called the michel-getheaht or *great thought.* In Turner's Ang. Sax. b. 8, c. 4 & 5; Hallam's Mid. Ag. ch. viii., and Palgrave's Rise and Progress of the Eng. Commonw. vol. 2, pp. 225, 385, the student will find all that is known respecting the constitution and powers of this assembly. How it ceased to be summoned, and how our present national assembly arose in its place, or whether its name only was altered to that of parliament; and how that assembly became divided into two houses, are subjects of deep interest to the constitutional lawyer, but upon which, owing to the insufficiency of our early records, no satisfactory conclusions can be established.

(3) In the Saxon Chronicle, it is

Glanvil, who wrote in the reign of Henry the Second, speaking of the particular amount of an amercement in the sheriff's court, says, it had never been yet ascertained by the general assize, or assembly, but was left to the custom of particular counties [g]. Here the general assize is spoken of as a meeting well known, and its statutes or decisions are put in a manifest contradistinction to custom, or the common law. And in [149] Edward the Third's time an act of parliament, made in the reign of William the Conqueror, was pleaded in the case of the abbey of St. Edmund's-bury, and judicially allowed by the court [h].

Hence, it indisputably appears, that parliaments, or general councils, are coeval with the kingdom itself. How those parliaments were constituted and composed, is another question, which has been matter of great dispute among our learned antiquaries; and particularly, whether the commons were summoned at all; or if summoned, at what period they began to form a distinct assembly [4]. But it is not my intention here to enter into controversies of this sort. I hold it sufficient that it is generally agreed, that in the main the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of king John, A.D. 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants, in chief under the crown, by the sheriff and bailiffs; to meet at a certain place, with forty days' notice, to assess aids and scutages when

[g] *Quanta esse debeat per nullam assisam generalem determinatum est, sed pro consuetudine singulorum comitatuum debetur*, l. 9, c. 10.

[h] Year-book, 21 Edw. 3, 60.

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mentioned (A.D. 1087), that William the Conqueror three times in every year met his "witan" or "commune concilium;"—(A.D. 1102), that Hen. I., used to summon assemblies of all the "heafodemen" or magnates of the land, both lay and clerical;—(A.D. 1123), that all the bishops, abbots, and thanes came to the king's "gewitene-mot";—(A.D. 1125), to the king's "concilie";—(A.D. 1127), and elsewhere, to his "hird" or court.

(4) There is a very concise statement of the arguments upon this question in Hallam's Mid. Ag. iii. 40.

Professor Millar, a zealous defender of popular principles, has also, in his Historical View of the English Government, thrown great light on this curious and highly interesting question, which seems to be now completely set at rest, at least, until farther records are discovered.

necessary. And this constitution has subsisted in fact at least from the year 1266, 49 Hen. III., there being still extant writs of that date, to summon knights, citizens, and burgesses, to parliament. I proceed therefore to inquire wherein consists this constitution of parliament, as it now stands, and has stood for the space of at least five hundred years. And in the prosecution of this inquiry, I shall consider, first, the manner and time of its assembling: secondly, its constituent parts: thirdly, the laws and customs relating to parliament, considered as one aggregate body: fourthly and fifthly, the laws and customs relating to each house separately and distinctly taken: sixthly, the method of proceeding, and of making statutes, in both houses: and lastly, the manner of the parliament's adjournment, prorogation, and dissolution.

Division of the subject under seven heads.

[150]

I. Of the manner and time of assembling.

I. As to the manner and time of assembling. The parliament is regularly to be summoned by the king's writ or letter, issued out of chancery by advice of the privy council, at least forty days before it begins to sit[5]. It is a branch of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any, except the king alone. And this prerogative is founded upon very good reason. For, supposing it had a right to meet spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met, and half absented themselves, who shall determine which is really the legislative body, the part assembled, or that which stays away? It is therefore necessary that the parliament should be called together at a determinate time and place: and highly becoming its dignity

(5) This was a provision of the Magna Charta of King John, cap. 17, confirmed and enforced by 7 & 8 Wm. 3, c. 25, s. 1. But now the time is uniformly extended to fifty days (2 Hats. 290), although no positive law has been made on the subject. This practice was introduced by the 22nd article of the Treaty of Union with Scotland, which, on account of the distance of some parts of that country from London, required that the time between the teste and the return of the writ of summons for the assembling of the first parliament of Great Britain should not be less than fifty days. It is now in the power of the crown, under particular circumstances, to call parliament together upon fourteen days' notice, notwithstanding any prorogation or adjournment to a longer period. (See 37 Geo. 3, c. 127, and 39 & 40 Geo. 3, c. 14).

and independence, that it should be called together by none but one of its own constituent parts: and, of the three constituent parts, this office can only appertain to the king; as he is a single person, whose will may be uniform and steady; the first person in the nation, being superior to both houses in dignity; and the only branch of the legislature that has a separate existence, and is capable of performing any act at a time when no parliament is in being[1]. Nor is it an exception to this rule that, by some modern statutes, on the demise of a king or queen, if there be then no parliament in being, the last parliament revives, and is to sit again for six months, unless dissolved by the successor: for this revived parliament must have been originally summoned by the crown[6].

It is true, that by a statute, 16 Car. I. c. 1, it was enacted, [151] that, if the king neglected to call a parliament for three years, the peers might assemble and issue out writs for choosing one; and, in case of neglect of the peers, the constituents might meet and elect one themselves. But this, if ever put in practice, would have been liable to all the inconveniences I have just now stated: and the act itself was esteemed so highly detrimental and injurious to the royal prerogative, that it was repealed by statute 16 Car. II. c. 1. From thence therefore no precedent can be drawn.

It is also true, that the convention-parliament, which restored king Charles the Second, met above a month before his return; the lords by their own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament: and that the said parliament sat till the twenty-ninth of December, full seven months after the Restoration; and enacted many laws, several of which are still in force. But this was for the necessity of the thing, which supersedes all law; for

[1] By motives somewhat similar to these the republic of Venice was actuated, when, towards the end of the seventh century, it abolished the tribunes of the people, who were annually chosen by the several districts of the Venetian territory, and constituted a doge in their stead; in whom the executive power of the state at present resides. For which their historians have assigned these, as the principal reasons. 1. The propriety of having the executive power a part of the legislative, or senate; to which the former annual magistrates were not admitted. 2. The necessity of having a single person to convoke the great council when separated. (Mod. Un. Hist. xxvii. 15).

(6) Vide infra, p. 188.

if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And the first thing done after the king's return was to pass an act declaring this to be a good parliament, notwithstanding the defect of the king's writs[j]. So that, as the royal prerogative was chiefly wounded by their so meeting, and as the king himself, who alone had a right to object, consented to waive the objection, this cannot be drawn into an example in prejudice of the rights of the crown. Besides, we should also remember, that it was at that time a great doubt among the lawyers[k], whether even this healing act made it a good parliament; and held by very many in the negative: though it seems to have been too nice a scruple. And yet, out of abundant caution, it was thought necessary to confirm its acts in the next parliament, by statute 13 Car. II. c. 7, and c. 14.

[152] It is likewise true, that at the time of the Revolution, A.D. 1688, the lords and commons, by their own authority, and upon the summons of the prince of Orange (afterwards king William), met in a convention, and therein disposed of the crown and kingdom. But it must be remembered, that this assembling was upon a like principle of necessity as at the restoration; that is, upon a full conviction that king James the Second had abdicated the government, and that the throne was thereby vacant: which supposition of the individual members was confirmed by their concurrent resolution, when they actually came together. And, in such a case as the palpable vacancy of a throne, it follows *ex necessitate rei*, that the form of the royal writs must be laid aside, otherwise no parliament can ever meet again. For, let us put another possible case, and suppose, for the sake of argument, that the whole royal line should at any time fail and become extinct, which would indisputably vacate the throne: in this situation it seems reasonable to presume, that the body of the nation, consisting of lords and commons, would have a right to meet and settle the government; otherwise there must be no government at all. And upon this and no other principle did the convention in 1688 assemble. The vacancy of the throne was precedent to their meeting without any royal summons, not a consequence of it. They did not assemble without writ, and then make the throne vacant;

[j] Stat. 12 Car. II. c. 1. [k] 1 Sid. 1.

but, the throne being previously vacant by the king's abdication, they assembled without writ, as they must do if they assembled at all. Had the throne been full, their meeting would not have been regular; but as it was really empty, such meeting became absolutely necessary. And accordingly it is declared by statute 1 Wm. & M. st. 1, c. 1, that this convention was really the two houses of parliament, notwithstanding the want of writs or other defects of form. So that, notwithstanding these two capital exceptions, which were justifiable only on a principle of necessity (and each of which, by the way, induced a revolution in the government), the rule laid down is in general certain, that the king, only, can convoke a parliament.

And this by the ancient statutes of the realm[l] he is bound [153] to do every year, or oftener, if need be. Not that he is, or ever was, obliged by these statutes to call a *new* parliament every year; but only to permit a parliament to sit annually for the redress of grievances, and dispatch of business, *if need be*[7]. These last words are so loose and vague, that such of our monarchs as were inclined to govern without parliaments, neglected the convoking them sometimes for a very considerable period, under pretence that there was no need of them. But to remedy this, by the statute 16 Car. II. c. 1, it is enacted, that the sitting and holding of parliaments shall not be intermitted above three years at the most. And by the statute 1 Wm. & M. st. 2, c. 2, it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening and preserving the laws, parliaments ought to be held *frequently*. And this indefinite *frequently* is again reduced to a certainty, by statute 6 Wm. & M. c. 2, which enacts, as the statute of Charles the Second had done before, that a new parliament shall be called within three years[m] after the determination of the former.

[l] 4 Edw. III. c. 14; 36 Edw. III. c. 10.

[m] This is the same period that is allowed in Sweden for intermitting their general diets, or parliamentary assemblies. Mod. Un. Hist. xxxiii. 15.

(7) In consequence of the supplies being voted only for one year at a time, and the Marine Forces and Mutiny Acts being passed for one year only, the necessity for the annual session of the parliament is no longer hypothetical; parliament being never prorogued to a period beyond a year from the commencement of these acts. (See Hallam Const. His. Vol. III. p. 159.)

II. Of the constituent parts of parliament.

II. The constituent parts of a parliament are the next objects of our inquiry. And these are, the king's majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual[8], the lords temporal (who sit, together with the king, in one house), and the commons, who sit by themselves in another. And the king and these three estates, together, form the great corporation or body politic of the kingdom [n], of which the king is said to be *caput, principium, et finis.* For upon their coming together the king meets them, either in person or by representation; without which there can be no beginning of a parliament [o]: and he also has alone the power of dissolving them.

[154] It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them, for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislative would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus the long parliament of Charles the First, while it acted in a constitutional manner with the royal concurrence, redressed many heavy grievances, and established many salutary laws. But when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration; and in consequence of these united powers, overturned both church and state, and established a worse oppression than any they pretended to remedy. To hinder, therefore, any such encroachments, the king is himself a part of the parliament: and, as this is the reason of his being so, very properly therefore the share of the legislation, which the constitution has placed in the crown, consists in the power of *rejecting* rather than *resolving;* this being sufficient to answer the end proposed. For we may apply to

[n] 4 Inst. 1, 2; Stat. 1 Eliz. c. 3; Hale of Parl. 1. [o] 4 Inst. 6.

(8) Whether the lords spiritual form a separate estate of the realm has been much questioned. (Hallam. Mid. Ag. iii. 157, 158, note). It is a nearly nominal distinction, inasmuch as the legislative power resides, not in the king and the three estates of the realm, but in the king and the two houses of parliament. Vide infra, p. 156.

the royal negative in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of *doing* wrong, but merely of *preventnig* wrong from being done[p]. The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative therefore cannot abridge the executive power of any rights which it now has by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon [155] the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching and punishing the conduct (not indeed of the king[q], which would destroy his constitutional independence; but, which is more beneficial to the public) of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of liberty and happiness of the community.

The king

Let us now consider these constituent parts of the sovereign power, or parliament, each in a separate view. The king's

[p] *Sulla—tribunis plebis sua lege injuriæ faciendæ potestatem ademit, auxilii ferendi reliquit.*—De LL. 3, 9.

[q] Stat. 12 Car. II. c. 30.

majesty will be the subject of the next, and many subsequent chapters, to which we must at present refer.

The spiritual lords.

The next in order are the spiritual lords. These consist of two archbishops, and twenty-four bishops; and at the dissolution of monasteries by Henry VIII., consisted likewise of twenty-six mitred abbots, and two priors[r]: a very considerable body, and in those times equal in number to the temporal nobility[s] 9. All these hold, or are supposed to hold, certain [156] ancient baronies under the king: for William the Conqueror thought proper to change the spiritual tenure of frank-almoign or free alms, under which the bishops held their lands during the Saxon government, into the feodal or Norman tenure by barony; which subjected their estates to all civil charges and assessments, from which they were before exempt[t]: and, in right of succession to those baronies, which were unalienable from their respective dignities, the bishops and abbots were

[r] Seld. tit. hon. 2, 5, 27. [s] Co. Litt. 97.
[t] Gilb. Hist. Exch. 55; Spelm. W. I. 291.

(9) In the place referred to, Lord Coke says, that from the 118 monasteries founded by the kings of England, twenty-seven abbots and two priors holding of the king per baroniam, were called to the parliaments by writ and were lords of parliament (see, however, 4 Inst. 1). Although this is, therefore, no authority for reducing the number of the temporal peerage so low as fifty-four or fifty-five, yet Mr. Hallam, than whom it is impossible to quote a higher authority on a point requiring the examination of the original sources of historic information, says expressly (Const. Hist. vol. 1, pp. 96, 99), that the mitred abbots and priors, before the act for abolishing monasteries (30 Hen. 8, c. 13), "composed more than a third part of the House of Lords," and although their number varied considerably in different parliaments, they always, joined to the twenty-one bishops, preponderated over the temporal peers.

The Bishops of London, Durham, and Winchester, rank next to the archbishops; the rest according to priority of consecration. An order in council appeared in the *London Gazette*, in October, 1838, declaring that the sees of St. Asaph and Bangor shall be united on the next vacancy in either, and that on that event occurring, the bishopric of Manchester shall be immediately created within the archiepiscopal see of York, and that the county of Lancaster shall form the see of the new bishop, being for that purpose detached from the diocese of Chester.

To the spiritual lords must now be added one archbishop and three bishops for Ireland, who, by the 40 Geo. 3, c. 67, are to sit in parliament every session by rotation; and by the fourth article of the Union, while so sitting, they have all the same rights as the lords spiritual of Great Britain. By the same article, all the lords spiritual of Ireland rank immediately after the lords spiritual of Great Britain, of the same degree, and enjoy all the same privileges, except those of sitting in the House of Lords, and the privileges depending thereon, particularly that of sitting on the trial of peers.

allowed their seats in the house of lords[u]. But though these lords spiritual are in the eye of the law a distinct estate from the lords temporal, and are so distinguished in most of our acts of parliament, yet in practice they are usually blended together under the one name of *the lords;* they intermix in their votes; and the majority of such intermixture joins both estates. And from this want of a separate assembly and separate negative of the prelates, some writers have argued[v] very cogently, that the lords spiritual and temporal are now in reality only one estate[w]: which is unquestionably true in every effectual sense, though the ancient distinction between them still nominally continues. For if a bill should pass their house, there is no doubt of its validity, though every lord spiritual should vote against it; of which Selden[x], and Sir Edward Coke[y], give many instances: as, on the other hand, I presume it would be equally good, if the lords temporal present were inferior to the bishops in number, and every one of those temporal lords gave his vote to reject the bill; though Sir Edward Coke seems to doubt[z] whether this would not be an *ordinance,* rather than an *act,* of parliament.

The temporal lords. [157]

The *lords temporal* consist of all the peers of the realm (the bishops not being in strictness held to be such, but merely lords of parliament[a]) by whatever title of nobility distinguished; dukes, marquisses, earls, viscounts, or barons; of which dignities we shall speak more hereafter. Some of these sit by descent, as do all ancient peers; some by creation, as do all new made ones; others, since the union with Scotland, by election, which is the case with the sixteen peers, who represent the body of the Scots nobility[10]. Their

[u] Glanv. 7. 1; Co. Litt. 97; Seld. tit. hon. 2, 5, 19.

[v] Whitelocke on Parliam. c. 72; Warburt. Alliance, b. 2, c. 3.

[w] Dyer, 60.

[x] Baronage, p. 1, c. 6. The act of uniformity, 1 Eliz. c. 2, was passed with the dissent of all the bishops: (Gibs. codex, 286), and therefore the style of *lords spiritual* is omitted throughout the whole.

[y] 2 Inst. 585, 6, 7. See Keilw. 184; where it is holden by the judges, 7 Hen. VIII. that the king may hold a parliament without any spiritual lords. This was also exemplified in fact in the two first parliaments of Charles II.: wherein no bishops were summoned till after the repeal of the statute 16 Car. I. c. 27, by statute 13 Car. II. st. 1, c. 2.

[z] 4 Inst. 25.

[a] Staunford, P. C. 153; [2 Salk. 135].

(10) The representative peers of Scotland are elected for one parliament only. To the above number of lords temporal must now be added the twenty-eight representative peers of Ireland, who are elected for life.

number is indefinite, and may be increased at will by the power of the crown[11]; and once, in the reign of queen Anne, there was an instance of creating no less than twelve together; in contemplation of which, in the reign of king George the First, a bill passed the house of lords, and was countenanced by the then ministry, for limiting the number of the peerage. This was thought by some to promise a great acquisition to the constitution, by restraining the prerogative from gaining the ascendant in that august assembly, by pouring in at pleasure an unlimited number of new created lords. But the bill was ill relished and miscarried in the house of commons, whose leading members were then desirous to keep the avenues to the other house as open and easy as possible[12].

The distinction of rank and honour is necessary in every well-governed state: in order to reward such as are eminent for their services to the public, in a manner the most desirable to individuals, and yet without burden to the community; exciting thereby an ambitious yet laudable ardour, and generous emulation in others. And emulation or virtuous ambition, is a spring of action, which, however dangerous or invidious in a mere republic or under a despotic sway, will certainly be attended with good effects under a free monarchy; where, without destroying its existence, its excesses may be continually restrained by that superior power from which all honour is derived. Such a spirit, when nationally diffused, gives life and vigour to the community; it sets all the wheels
[158] of government in motion, which, under a wise regulator, may be directed to any beneficial purpose; and thereby every individual may be made subservient to the public good, while he principally means to promote his own particular views. A body of nobility is also more peculiarly necessary in our mixed and compounded constitution, in order to support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of both. It creates and pre-

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(11) This prerogative was restrained by the fourth article of the act of union with Ireland, which allows the creation of only one Irish peerage for every three of such peerages becoming extinct until their number becomes reduced to one hundred; exclusive, however, of such peerages as are held concurrently with peerages of Great Britain.

(12) The arguments for and against a limitation to the number of the peerages are excellently summed up by Mr. Hallam. (Const. Hist. iii. 319).

serves that gradual scale of dignity which proceeds from the peasant to the prince; rising like a pyramid from a broad foundation, and diminishing to a point as it rises. It is this ascending and contracting proportion that adds stability to any government; for when the departure is sudden from one extreme to another, we may pronounce that state to be precarious. The nobility therefore are the pillars, which are reared from among the people, more immediately to support the throne; and, if that falls, they must also be buried under its ruins. Accordingly, when in the last century the commons had determined to extirpate monarchy, they also voted the house of lords to be useless and dangerous. And since titles of nobility are thus expedient in the state, it is also expedient that their owners should form an independent and separate branch of the legislature. If they were confounded with the mass of the people, and like them had only a vote in electing representatives, their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions. It is therefore highly necessary that the body of nobles should have a distinct assembly, distinct deliberations, and distinct powers from the commons[13].

The commons consist of all such men of property in the kingdom, as have not seats in the house of lords; every one of which has a voice in parliament, either personally or by his representatives. In a free state every man, who is supposed a free agent, ought to be in some measure his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small and its citizens easily known, should be exercised by the people in their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state. But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is increased. Thus when, after the social war, all the burghers of Italy were admitted free

The commons.

[159]

(13) A vast amount of valuable antiquarian and constitutional information on the original constitution of the British peerage, is collected in the four "Reports of the Committee appointed by the Lords to report on the Dignity of a Peer of the Realm;" ordered by the House of Commons to be printed, 1826.

citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and disorderly; which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so large a state as ours it is therefore very wisely contrived, that the people should do that by their representatives, which it is impracticable to perform in person; representatives, chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished. The counties are therefore represented by knights, elected by the proprietors of lands: the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or supposed trading interest of the nation; much in the same manner as the burghers in the diet of Sweden are chosen by the corporate towns, Stockholm sending four, as London does with us, other cities two, and some only one[b]. The number of English representatives is 513, and of Scots 45; in all 558[14]. And every member, though chosen

[b] Mod. Un. Hist. xxxiii. 18.

(14) Under the English Reform Act (2 & 3 Wm. 4, c. 45), the number of representatives for England and Wales is reduced from 513 to 500, *viz.* 158 for counties and 342 for boroughs. By the corresponding act for Scotland (2 & 3 Wm. 4, c. 65), the number of representatives for that country is increased from 45 to 53, *viz.* 30 for counties and 23 for boroughs. And by the Reform Act for Ireland (2 & 3 Wm. 4, c. 88), the number of Irish representatives is increased from 100 (under the Act of Union, 39 & 40 Geo. 3, c. 67) to 105, *viz.* 64 for counties and 41 for boroughs, —making a collective number of 658 representatives, the same number as before the Reform Acts.

In the reign of Edw I., the county members were 74, increased to 90 in the reign of Hen. 8; 92 in the reign of Car. 2; 122 in the reign of Anne; 186 in the reign of Geo. 3; 188 in the reign of Geo. 4, and 252 in the reign of Wm. 4.

The members for cities and boroughs in the reign of Edw. 1, were 160, and were increased as follows:—In the reign of Edw. 2, to 172; Edw. 3, to 194; Hen. 6, to 210; Edw. 4, to 218; Hen. 8, to 239; Edw. 6, to 287; Mary, to 308; Elizabeth, to 372; Jac. 1, to 399; Car. 1, to 417; Car. 2, to 421; Anne, to 436; Geo. 3, to 472. In the reign of Geo. 4, the borough of Grampound was disfranchised, by which the number was reduced to 470. Lastly, by the Reform Acts, 111 members were taken from 55 boroughs sending two members each and one borough sending one member; and 32 members were taken from 30 boroughs sending two members each and one borough (Weymouth) sending four members, making a total reduction of 143 members. On the other hand, in England and Wales 22 new boroughs were created, sending two members each, and 22 others

by one particular district, when elected and returned, serves for the whole realm. For the end of his coming thither is not particular, but general: not barely to advantage his constituents, but the *common* wealth; to advise his majesty (as appears from the writ of summons[c]) "*de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum, et defensionem regni Angliæ et ecclesiæ Anglicanæ concernentibus.*" And therefore he is not bound, like a deputy in the united provinces, to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks it proper or prudent so to do[15].

These are the constituent parts of a parliament; the king, [160] the lords spiritual and temporal, and the commons. Parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only, of the three is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in times of madness and anarchy, the commons once passed a vote[d],

[c] 4 Inst. 14. [d] 4 Jan. 1648.

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sending one member each, and eight additional members were given to the Scottish boroughs and five to the Irish cities, making the actual reduction in the number of borough members by the Reform Acts 64, and their present number 406.

(15) In America the opposite doctrine has wrought incalculable evils. There a custom is gaining ground, which will, in the end, render all the guarantees of the representative government useless and vain. The electors, when they name a deputy, often trace out for him a line of conduct, from which he is not to depart, and, except that there is no tumult, it is, as if the majority met and deliberated in the market-place. (De Tocqueville). This system of delegation is complained of by Mr. Webster, in the opening of his celebrated speech on the tariff. "Different members," says he, "of the senate have instructions, which they feel bound to obey and which clash with one another. We have this morning seen an honourable member from New York, (an important motion being under consideration), lay his instructions on the table, and point to them, as his power of attorney, and as containing his directions for his vote."—"How absurd," says one of the most sensible and right-feeling of modern historians (Smyth's Lectures on the French Revolution, vol. 3, p. 384), "to have a question decided by the constituents at one end of a country and afterwards debated at the other! Of what use are reasoning and eloquence addressed to those, who, in the first place, have to lay their instructions on the table?" In our own constitution, no principle is more firmly established than that stated in the text. Mr. Justice Coleridge has most judiciously directed the student's attention to Mr. Burke's statement of it in the conclusion of his speech to the electors of Bristol.

"that whatever is enacted or declared for law by the commons in parliament assembled hath the force of law; and as the people of this nation are concluded thereby, although the consent and concurrence of the king or house of peers be not had thereto:" yet, when the constitution was restored in all its forms, it was particularly enacted by statute 13 Car. II. c. 1, that if any person shall maliciously or advisedly affirm, that both or either of the houses of parliament have any legislative authority without the king, such person shall incur all the penalties of a *præmunire*.

III. Of the laws and customs of the parliament collectively.

III. We are next to examine the laws and customs relating to parliament, thus united together and considered as one aggregate body.

The power and jurisdiction of parliament, says sir Edward Coke[e], is so transcendent and absolute, that it cannot be confined, either for causes or persons within any bounds. And of this high court, he adds, it may be truly said, "*si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.*" It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power[16], which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mis-
[161] chiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown; as was done in the reign of Henry

[e] 4 Inst. 36.

(16) See post, p. 186. The learned commentator is here speaking only of the supreme legal power of parliament. As for the obligatory authority of laws made in opposition to the superior laws of nature or of God. (Vide supra, p. 41—43). "The omnipotence of parliament," says Mr. Christian, "signifies nothing more than the supreme sovereign power of the state, or a power of action uncontrolled by any superior. In this sense, the king, in the exercise of his prerogatives, and the House of Lords, in the interpretation of laws, are also omnipotent; that is, free from the control of any superior provided by the constitution."

VIII., and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of king Henry VIII., and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apophthegm of the great lord treasurer Burleigh, "that England could never be ruined but by a parliament;" and, as sir Matthew Hale observes[f], this being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy. To the same purpose the president Montesquieu, though I trust too hastily, presages[g], that as Rome, Sparta, and Carthage have lost their liberty and perished, so the constitution of England will in time lose its liberty, will perish: it will perish whenever the legislative power shall become more corrupt than the executive.

It must be owned that Mr. Locke[h], and other theoretical writers, have held, that "there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for when such trust is abused, it is thereby forfeited, and devolves to those who gave it." But however just this [162] conclusion may be in theory, we cannot practically adopt it, nor take any *legal* steps for carrying it into execution, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality; and, by annihilating the sovereign power,

[f] Of parliaments, 49. [g] Sp. L. 11, 6.
[h] On Gov. p. 2, § 149. 227.

repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event as must render all legal provisions ineffectual[1]. So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.

Qualification of members of both houses.

In order to prevent the mischiefs that might arise, by placing this extensive authority in hands that are either incapable, or else improper to manage it, it is provided by the custom and law of parliament[j], that no one shall sit or vote in either house, unless he be *twenty-one years of age*. This is also expressly declared by statute 7 & 8 W. III. c. 25, with regard to the house of commons; doubts having arisen, from some contradictory adjudications, whether or no a minor was incapacitated from sitting in that house[k]. It is also enacted by statute 7 Jac. I. c. 6, that no member be permitted to enter into the house of commons, till he hath taken the *oath* of allegiance before the lord steward or his deputy[17]: and by 30 Car. II. st. 2, and 1 Geo. I. c. 13, that no member shall vote or sit in either house, till he hath in the presence of the house taken the oath of allegiance, supremacy, and abjuration, and subscribed and repeated the declaration against transubstantiation, and invocation of saints, and the sacrifice of the mass[18]. *Aliens*, unless naturalized, were likewise by the law of parliament incapable to serve therein[l]: and now it is enacted by statute 12 & 13 W. III. c. 2, that no alien, even though he be naturalized, shall be capable of being a member of either house of
[163] parliament[19]. And there are not only these standing incapacities: but if any person is made a peer by the king, or

[1] See page 244.
[j] Whitelocke, c. 50; 4 Inst. 47.
[k] Com. Journ. 10 Mar. 1623; 18 Feb. 1625.
[l] Com. Journ. 16 Dec. 1690.

(17) At the table of the House of Commons. (1 & 2 Wm. 4, c. 9).

(18) The oath of abjuration was, on the death of the old Pretender in 1765, slightly altered, (see 6 Geo. 3, c. 58). In the place of the oaths of allegiance, supremacy, and abjuration, Roman Catholic members of parliament are required to take the oath prescribed by the Roman Catholic Relief Act. (10 Geo. 4, c. 7, s. 2).

(19) Vide infra, p. 374-5.

elected to serve in the house of commons by the people, yet may the respective houses upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member[m]: and this by the law and custom of parliament[20].

The law of parliament.

For, as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti;* a law which sir Edward Coke[n] observes is, "*ab omnibus quærenda, a multis ignorata*[21], *a paucis cognita.*" It will not therefore be expected that we should enter into the examination of this law, with any degree of minuteness: since, as the same learned author assures us[o], it is much better to be learned out of the rolls of parliament, and other records, and by precedents, and continual expe-

[m] Whitelock of parl. c. 102. See Lords' Journ. 3 May, 1620; 13 May, 1624; 26 May, 1725. Com. Journ. 14 Feb. 1580; 21 Jun. 1628; 9 Nov. 21 Jan. 1640; 6 Mar. 1676; 6 Mar. 1711; 7 Feb. 1769.

[n] 1 Inst. 11.

[o] 4 Inst. 50.

(20) This sentence was added to the text in consequence of the circumstances attending Mr. Wilkes's election for Middlesex in 1769. In 1764, the House of Commons had expelled Mr. Wilkes from their body, on the ground of his having been the author of a libel contained in No. 45 of the North Briton. In 1768, he became a candidate for the representation of Middlesex and was duly returned to parliament, but the house again expelled him, alleging and recording as their reason for so doing the libels he had published. The county again elected him their representative, and the house then resolved (17th Feb. 1769) that he was incapable of sitting in that parliament simply on the ground of having been expelled from the house. A third time he was elected by the county, and again his election declared void by the House of Commons. A Mr. Luttrell then became a candidate for the representation in opposition to Mr. Wilkes, and though the votes for Mr. Wilkes were nearly four times the number of those for Mr. Luttrell, the house resolved that Mr. Wilkes was unduly returned by the sheriffs, and Mr. Luttrell consequently took his seat. A few years afterwards, however (1783), the resolution of 17th Feb. 1769 was expunged from the journals, as being subversive of the rights of electors; expulsion from the house being not sufficient of itself to disqualify from sitting in parliament. The early cases which bear upon the point are collected in Hatsell's Precedents, vol. i. p. 53, and are reviewed by Mr. Hallam, Con. Hist. vol. i. 366—376.

(21) Lord Holt has observed that, "as to what my Lord Coke says, that the '*lex parliamenti est a multis ignorata,*' this is only because they will not apply themselves to understand it." 2 Ld. Raym. 1114; Hale's Treatise on the Jurisdiction of the House of Lords, and the Preface by Hargrave, and 8 T. R. 314.—[CHITTY].

rience, than can be expressed by any one man. It will be sufficient to observe, that the whole of the law and custom of parliament, has its original from this one maxim, "that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere[p]." Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine the merits of either case[22]. But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the parliament itself; and are not defined and ascertained by any particular stated laws[23].

[p] 4 Inst. 15.

(22) In the late case of *Stockdale* v. *Hansard* (7 Car. & Payne, 737; 9 A. & E. 1, and 11 A. & E. 253), the extent to which the courts of justice can take cognizance of, and even control the privileges claimed by the House of Commons has undergone much discussion. The circumstances of that case were briefly as follows: The House of Commons ordered a certain report to be printed, containing matter reflecting upon Stockdale, which, if printed by any private person, would have been a libel. For this publication, Stockdale brought an action against Messrs. Hansard, the printers to the House of Commons. They pleaded that the documents in question had been published by them under the direction of the House of Commons, and that the house had resolved that the power of publishing such of their reports, votes, and proceedings, as they thought conducive to the public interest, was an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament as the representative portion of it. Upon demurrer to this plea, the Court of Queen's Bench was called upon to decide, whether a court of law is or is not excluded by the law of parliament from the consideration of a privilege claimed by a formal resolution of the House of Commons, and set up by their printer as a justification of an act otherwise unlawful. After a full and accurate examination of all the authorities on the subject and the most anxious consideration of the arguments pressed upon them by the attorney-general, the four judges, Denman, C. J., Littledale, Patteson, and Coleridge, were unanimous in overruling the defence set up by Messrs. Hansard. The judgments delivered by these eminent judges carry conviction to every mind, and their legal correctness and the soundness of the constitutional principles on which they are based are now universally acknowledged. In consequence of this decision, a statute (3 & 4 Vict. c. 9) was passed for the special protection of all persons publishing parliamentary reports, votes, or other proceedings by order of either House of Parliament.

(23) The law of parliament rests in the breast of each house of parliament in the same sense that the common law rests in the breast of the judges. (Vide supra, p. 69). The two houses are the

The *privileges* of parliament are likewise very large and indefinite. And therefore when in 31 Hen. VI. the house of lords propounded a question to the judges concerning them, the chief justice, sir John Fortescue, in the name of his brethren, declared, "that they ought not to make answer to that question: for it hath not been used aforetime that the justices should in any way determine the privileges of the high court of parliament. For it is so high and mighty in its nature, that it may make law: and that which is law, it may make no law: and the determination and knowledge of that privilege belongs to the lords of parliament and not to the justices[q]." Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow subjects, but also more especially from being oppressed by the power of the crown. If therefore all the privileges of parliament were set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite[24]. Some however of the more notorious privileges of the members of either house are, privilege of speech, of person, of their domestics, and of their lands and goods. As to the first, privilege of speech, it is declared by the statute 1 W. & M. st. 2, c. 2, as one of the liberties of the people, "that the freedom of speech, and debates, and proceedings in parliament, ought not to be

The *privileges* of parliament. [164]

[q] Seld. Baronage, part 1, c. 4.

depositaries of their respective laws and must decide in all cases of doubt; but they must decide according to the established law of parliament.

(24) It is a most pernicious doctrine to maintain that the privileges of either separate branch of the legislature are arbitrary, because no where defined by any particular stated laws. Precedents and law bind each house of parliament no less than each court at Westminster. Lord C. J. Holt laid down the law very differently from Lord Coke. "The authority of parliament," said Lord Holt, "is from the law; and, as it is circumscribed by the law, so it may be exceeded; and, if they do exceed those legal bounds and authority, their acts are wrongful and cannot be justified any more than the acts of private men." (1 Salk. 505; 2 Ld. Raym. 1114).

impeached or questioned in any court or place out of parliament." And this freedom of speech is particularly demanded of the king in person, by the speaker of the house of commons, at the opening of every new parliament[25]. So likewise are the other privileges, of persons, servants, lands, and goods; which are immunities as ancient as Edward the Confessor, in in whose laws[r] we find this precept, "*ad synodos venientibus,*
[165] *sive summoniti sint, sive per se quid agendum habuerint, sit summa pax:*" and so too, in the old Gothic constitutions, "*extenditur hæc pax et securitas ad quatuordecim dies, convocato regni senatu*[s]." This included formerly not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. And still to assault by violence a member of either house, or his menial servant, is a high contempt of parliament, and there punished with the utmost severity. It has likewise peculiar penalties annexed to it in the courts of law, by the statutes 5 Hen. IV. c. 6, and 11 Hen. VI. c. 11. Neither can any member of either house be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament.

But all other privileges which derogate from the common law in matters of civil right, are now at an end, save only as to the freedom of the member's person; which in a peer (by the privilege of peerage[26]) is for ever sacred and inviolable;

[r] Cap. 3. [s] Steirnh. de jure Goth. l. 3, c. 3.

(25) Of course this privilege of speech extends only to speeches verbally addressed to either house. (1 M. & S. 273; 1 Esp. 226; 1 Saund. 132).

(26) By the common law, peers of the realm of England (6 Co. 52; 9 Co. 49 a, 68 a; Hob. 61; Sty. Rep. 222; 2 Salk. 512; 2 H. Bl. 272; 3 East, 127), and peeresses, whether by birth or marriage (6 Co. 52; Sty. Rep. 252; 1 Vent. 298; 2 Ch. Ca. 224), are constantly privileged from arrests in civil suits, on account of their dignity, and because they are supposed to have sufficient property, by which they may be compelled to appear; which privilege is extended by the act of union with Scotland (5 Anne, c. 8, art. 23, and see Fort. 165; 2 Str. 990) to Scotch peers and peeresses; and by the act of union with Ireland (39 & 40 Geo. 3, c. 67, art. 4, see 7 Taunt. 679; S. C., 1 Moore, 410) to Irish peers and peeresses. And they are not liable to be attached for the non-payment of money, pursuant to an order of nisi prius, which has been made a rule of court; (*Lord Falkland's case*, E. 36 Geo. 3, K. B.; 7 D. & E. 171, and see id. 448). But this privilege will not exempt them from attachments for not obeying the process of the courts, (1 Wils. 332; Say. Rep. 50, S. C., 1 Bur. 631), nor does it extend to peeresses by mar-

and in a commoner (by privilege of parliament) for forty days after every prorogation, and forty days before the next appointed meeting[27] [t]: which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. As to all other privileges, which obstruct the ordinary course of justice, they were restrained by the statutes 12 W. III. c. 3, 2 & 3 Ann. c. 18 and 11 Geo. II. c. 24, and are now totally abolished by statute 10 Geo. III. c. 50, which enacts, that any suit may at any time be brought against any peer or member of parliament, their servants[28], or any other person entitled to privilege of parliament; which shall not be impeached or delayed by pretence of any such privilege; except that the person of a member of the house of commons shall not thereby be subjected to any arrest of imprisonment. Likewise, for the benefit of commerce, it is provided by statute 4 Geo. III. c. 33[29], that any trader, having privilege of parliament, may be served with legal process for any just debt to the amount of 100*l.* and unless he make satisfaction within two months, it shall be deemed an act of [166] bankruptcy; and that commissions of bankrupt may be issued against such privileged traders, in like manner as against any other.

The only way by which courts of justice could anciently take cognizance of privilege of parliament was by writ of privilege, in the nature of a *supersedeas*, to deliver the party out

[t] 2 Lev. 72.

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riage, if they afterwards intermarry with commoners. (Co. Lit. 16; 2 Inst. 50; 4 Co. 118; Dyer, 79).—[CHITTY].

(27) By the law and custom of parliament members of the House of Commons are privileged from arrest, not only during the actual sitting of parliament, but for a convenient time sufficient to enable them to come from and return to any part of the kingdom before the first meeting and after the final dissolution of parliament. (See 10 Geo. 3, c. 50; 2 Str. 985; Fortes. 159; Com. Rep. 444; S. C., 1 Keny. 125).—[CHITTY].

(28) For examples of the breach of this privilege, see the cases collected in the note. (9 A. & E. 12).

(29) Amended by 45 Geo. 3, c. 124, s. 1; also by the General Bankrupt Act (6 Geo. 4, c. 16), the time for making satisfaction as above is reduced to one month, and the proceedings against bankrupt members of the House of Commons are otherwise facilitated. Also by 52 Geo. 3, c. 144, if the fiat against such a bankrupt be not superseded within twelve months, or his debts paid, or security given for their payment, his election may be declared void.

of custody when arrested in a civil suit[u]. For when a letter was written by the speaker to the judges, to stay proceedings against a privileged person, they rejected it as contrary to their oath of office[v]. But since the statute 12 W. III. c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it hath been held that such arrest is irregular *ab initio*, and that the party may be discharged upon motion[w]. It is to be observed, that there is no precedent of any such writ of privilege, but only in civil suits; and that the statute 1 Jac. I. c. 13, and that of King William (which remedy some inconveniences arising from privilege of parliament) speak only of civil actions. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes[x]; or as it hath been frequently expressed, of treason, felony, and breach (or surety) of the peace[y]. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants, in any *crime* whatsoever: for all crimes are treated by the law as being *contra pacem domini regis*. And instances have not been wanting, wherein privileged persons have been convicted of misdemesnors, and committed, or prosecuted to outlawry, even in the middle of a session[z]; which proceeding has afterwards received the sanction and approbation of parliament[a]. To which may be added, that a few years ago, the case of writing and publishing seditious libels was resolved by both
[167] houses[b], not to be entitled to privilege[30]; and that the reasons upon which that case proceeded[c], extended equally to every indictable offence. So that the chief, if not the only, privilege of parliament, in such cases, seems to be the right of receiving immediate information of the imprisonment or de-

[u] Dyer, 59; 4 Pryn. Brev. Parl. 757.
[v] Latch. 48; Noy. 83.
[w] Stra. 989.
[x] Com. Journ. 17 Aug. 1641.
[y] 4 Inst. 25; Com. Journ. 20 May, 1675.
[z] Mich. 16 Edw. IV. in Scacch.—Lord Raym. 1461.
[a] Com. Journ. 16 May, 1726.
[b] Com. Journ. 24 Nov., Lords' Journ. 29 Nov. 1763.
[c] Lords' Protest, ibid.

(30) Only a short time before the date of this resolution it had been determined by the unanimous judgment of Lord Camden and the Court of Common Pleas in *Wilkes's case* (2 Wils. 151), that the privileges of parliament are not lost to a member, by being convicted of libel, but only by treason, felony, or an actual breach of the peace.

tention of any member, with the reason for which he is detained: a practice that is daily used upon the slightest military accusations, preparatory to a trial by a court martial[d]; and which is recognized by the several temporary statutes for suspending the *habeas corpus* act[e]; whereby it is provided, that no member of either house shall be detained till the matter of which he stands suspected be first communicated to the house of which he is a member, and the consent of the said house obtained for his commitment or detaining. But yet the usage has uniformly been, ever since the revolution, that the communication has been subsequent to the arrest.

These are the general heads of the laws and customs relating to parliament, considered as one aggregate body. We will next proceed to

IV. The laws and customs relating to the *house of lords in particular*. These, if we exclude their judicial capacity, which will be more properly treated of in the third and fourth books of these Commentaries, will take up but little of our time.

IV. The laws and customs of the house of lords in particular.

One very ancient privilege is that declared by the charter of the forest[f], confirmed in parliament 9 Hen. III.; *viz.* that every lord spiritual or temporal summoned to parliament, and passing through the king's forests, may, both in going and returning, kill one or two of the king's deer without warrant; in view of the forester if he be present, or on blowing a horn if he be absent; that he may not seem to take the king's venison by stealth.

In the next place they have a right to be attended, and [168] constantly are, by the judges of the court of king's bench and common pleas, and such of the barons of the exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the king's learned counsel, being serjeants, and by the masters of the court of chancery; for their advice in point of law, and for the greater dignity of their proceedings. The secretaries of state, with the attorney and solicitor-general, were also used to attend the house of peers, and have to this day (together with the judges, &c.) their regular writs of summons issued out at the beginning of every parliament[g], *ad*

[d] Com. Journ. 20 Apr. 1762.
[e] Particularly 17 Geo. II. c. 6.
[f] c. 11.
[g] Stat. 31 Hen. VIII. c. 10. Smith's Commonw. b. 2, c. 3; Moor. 551; 4 Inst. 4; Hale of Parl. 140.

tractandum et consilium impendendum, though not *ad consentiendum*; but whenever of late years they have been members of the house of commons[h], their attendance here hath fallen into disuse.

Another privilege is, that every peer, by licence from the king, may make any other lord of parliament his proxy, to vote for him in his absence[i]. A privilege which a member of the other house can by no means have, as he is himself but a proxy for a multitude of other people[k] [31].

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his protest [32].

All bills likewise, that may in their consequences any way affect the right of the peerage, are by the custom of parliament to have their first rise and beginning in the house of peers, and to suffer no changes or amendments in the house of commons.

There is also one statute peculiarly relative to the house of lords, 6 Ann. c. 23, which regulates the election of the sixteen
[169] representative peers of North Britain, in consequence of the twenty-second and twenty-third articles of the union; and for that purpose prescribes the oaths, &c. to be taken by the electors; directs the mode of balloting; prohibits the peers

[h] See Com. Journ. 11 Apr. 1614; 8 Feb. 1620; 10 Feb. 1625; 4 Inst. 48.

[i] Seld. baronage, p. 1, c. 1.

[k] 4 Inst. 12.

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(31) The proxies in the House of Lords are still entered in Latin *ex licentia regis*: This created a doubt in November, 1788, whether the proxies in that parliament were legal on account of the king's illness? (1 Ld. Mountm. 342). But the license may be presumed. Proxies cannot be used in a committee (Ib. 106). A proxy cannot sign a protest in England but he could in Ireland (2 Ib. 191). If a peer after appointing a proxy appear personally in parliament, his proxy is revoked and annulled (4 Inst. 13). By the orders of the house, no proxy shall vote upon a question of guilty or not guilty; and a spiritual lord shall only be a proxy for spiritual lords, and a temporal lord for temporal lords. Two or more peers may be proxies for one absent peer; but Lord Coke is of opinion (4 Inst. 12), that they cannot vote unless they all concur. (1 Woodd. 41; Com. Dig. D. 19).—[CHRISTIAN].

(32) Lord Clarendon relates that the first instance of protests with reasons in England was in 1641, before which time dissentient peers usually set down their names simply as such: the first regular protest in Ireland was in 1662. (1 Ld. Mountm. 402).

electing from being attended in an unusual manner; and expressly provides, that no other matter shall be treated of in that assembly, save only the election, on pain of incurring a *præmunire*[33].

V. The laws and customs of the house of commons in particular.

V. The peculiar laws and customs of the house of commons relate principally to the raising of taxes, and the elections of members to serve in parliament.

First, with regard to taxes: it is the ancient indisputable privilege and right of the house of commons, that all grants of subsidies or parliamentary aids do begin in their house, and are first bestowed by them[1]; although their grants are not effectual to all intents and purposes, until they have the assent of the other two branches of the legislature. The general reason given for this exclusive privilege of the house of commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable, if the commons taxed none but themselves: but it is notorious that a very large share of property is in the possession of the house of lords: that this property is equally taxable, and taxed, as the property of the commons; and therefore the commons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, seems to be this. The lords being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and when once influenced to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous to give the lords any power of framing new taxes for the subject: it is sufficient that they have a power of rejecting, if they think the commons too lavish or improvident in their grants. But so reasonably jealous are the commons of this valuable privilege, that herein they will not suffer the other house to exert any

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[1] 4 Inst. 29.

(33) See also 2 & 3 Wm. 4, c. 63. The election of the representative peers for Ireland is regulated by the fourth article of the Union. (Vide supra, pp. 99, 100).

power but that of rejecting; they will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill; under which appellation are included all bills, by which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the land-tax; or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like[34]. Yet sir Matthew Hale[m] mentions one case, founded on the practice of parliament in the reign of Henry VI.[n], wherein he thinks the lords may alter a money bill: and that is, if the commons grant a tax, as that of tonnage and poundage, for *four years;* and the lords alter it to a less time, as for *two* years; here, he says, the bill need not be sent back to the commons for their concurrence, but may receive the royal assent without further ceremony; for the alteration of the lords is consistent with the grant of the commons. But such an experiment will hardly be repeated by the lords, under the present improved idea of the privilege of the house of commons, and, in any case where a money bill is remanded to the commons, all amendments in the mode of taxation are sure to be rejected.

Next with regard to the elections of knights, citizens, and burgesses; we may observe that herein consists the exercise of the democratical part of our constitution: for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies therefore it is of the utmost importance to regulate by whom, and in what manner, the suffrages are to be given. And the Athenians were so justly jealous of this prerogative, that a stranger, who interfered in the assemblies of the people, was punished by their laws with death: because such a man was
[171] esteemed guilty of high treason, by usurping those rights of sovereignty, to which he had no title. In England, where

[m] On parliaments, 65, 66.

[n] Year-book, 33 Hen. VI. 17. But see the answer to this case by sir Heneage Finch, Com. Journ. 22 Apr. 1671.

(34) The lords cannot make any alterations in the penalties imposed by any clause, or insert such clauses in any bill, or throw any charge, no matter how indirectly, on the subject. (See Hallam's Con. His. vol. iii. p. 37—46).

the people do not debate in a collective body, but by representation, the exercise of this sovereignty consists in the choice of representatives. The laws have therefore very strictly guarded against usurpation or abuse of this power, by many salutary provisions, which may be reduced to these three points, 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

Qualifications of the electors.

1. As to the qualifications of the electors. The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

And this constitution of suffrages is framed upon a wiser principle, with us, than either of the methods of voting, by centuries or by tribes, among the Romans. In the method by centuries, instituted by Servius Tullius, it was principally property, and not numbers, that turned the scale: in the method by tribes, gradually introduced by the tribunes of the people, numbers only were regarded, and property entirely overlooked. Hence the laws passed by the former method had usually too great a tendency to aggrandize the patricians [172] or rich nobles; and those by the latter had too much of a levelling principle. Our constitution steers between the two " extremes. Only such are entirely excluded, as can have no will of their own: there is hardly a free agent to be found,

who is not entitled to a vote in some place or other in the kingdom. Nor is comparative wealth, or property, entirely disregarded in elections; for though the richest man has only one vote at one place, yet if his property be at all diffused, he has probably a right to vote at more places than one, and therefore has many representatives. This is the spirit of our constitution: not that I assert it is in fact quite so perfect[o] as I have here endeavoured to describe it; for, if any alteration might be wished or suggested in the present frame of parliaments, it should be in favour of a more complete representation of the people[35].

[o] The candid and intelligent reader will apply this observation to many other parts of the work before him, wherein the constitution of our laws and government are represented as nearly approaching to perfection; without descending to the invidious task of pointing out such deviations and corruptions, as length of time and a loose state of national morals have too great a tendency to produce. The incurvations of practice are then the most notorious when compared with the rectitude of the rule; and to elucidate the clearness of the spring, conveys the strongest satire on those who have polluted or disturbed it.

(35) After a long and severe struggle this suggestion of the learned commentator's was at last accomplished by "the Act to amend the Representation of the People of England and Wales," (2 & 3 Wm. 4, c. 45), followed by the Reform Acts for Scotland (2 & 3 Wm. 4, c. 65), and Ireland (2 & 3 Wm. 4, c. 88). By these acts our representative system was reformed in two vital particulars. On the one hand, the right of returning members to parliament was taken away from many places, from which, (being decayed in property and almost deserted in population), no elective system whatever could ever be expected to eliminate "representatives of the people." These places were disfranchised to the number mentioned, supra, note 14, p. 159; and, as in the case of the borough of Grampound (1 & 2 Geo. 4, c. 47), their right of sending representatives was transferred to other places, from whose wealth and population it might be reasonably expected that, under an amended elective system, none but "representatives of the people" would be returned to the House of Commons. On the other hand, the Reform Act introduced great changes in the elective franchise itself. In this note, we need only notice the changes introduced in the qualification of electors for knights of the shire. For these the property qualification, before the Reform Act, was a freehold of the clear yearly value of 40*s*. (see text, 7 & 8 Wm. 3, c. 25; and 18 Geo. 2, c. 18, s. 6). But since the Reform Act, in the first place, the clear yearly value of such freehold qualifications must be not less than 10*l*. clear of all charges, unless the freeholder either has an estate of inheritance in his freehold, or if seised for life only, was so seised on 7th June, 1832, and continues so seised, or is in the actual *bonâ fide* occupation of his freehold, or has acquired the same by marriage, marriage settlement, devise, or promotion to any benefice or office; in all which cases the value need only be as before the act (sect. 18). In the second place, copyhold or other property, not of a freehold tenure, confers a qualification, if the same be for

Electors for knights of the shire.

But to return to our qualifications; and first those of electors for knights of the shire. 1. By statute 8 Hen. VI. c. 7, and 10 Hen. VI. c. 2, (amended by 14 Geo. III. c. 58,) the knights of the shire shall be chosen of people whereof every man shall have freehold to the value of forty shillings by the year within the county; which (by subsequent statutes) is to be clear of all charges and deductions except parliamentary and parochial taxes. The knights of shires are the representatives of the landholders, or landed interest of the kingdom: their electors must therefore have estates in lands or tenements within the county represented: these estates must be freehold, that is, for term of life at least: because beneficial leases for long terms of years were not in use at the making of these statutes, and copyholders were then little better than villeins, absolutely dependent upon their lords: this freehold must be of forty shillings annual value: because that sum [173] would then, with proper industry, furnish all the necessaries of life, and render the freeholder, if he pleased, an independent man. For bishop Fleetwood, in his *chronicum preciosum*, written at the beginning of the present century, has fully proved forty shillings in the reign of Henry VI. to have been equal to twelve pounds *per annum* in the reign of queen Anne; and, as the value of money is very considerably lowered since the bishop wrote, I think we may fairly conclude, from this and other circumstances, that what was equivalent to twelve pounds in his days is equivalent to twenty at present. The other less important qualifications of the electors for counties in England and Wales may be collected from the statutes cited in the margin[o]; which direct, 2. That no person under

[o] 7 & 8 Wm. III. c. 25; 10 Ann. c. 23; 2 Geo. II. c. 24; 18 Geo. II. c. 18; 31 Geo. II. c. 14; 3 Geo. III. c. 24.

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life or other larger estate, provided the clear yearly value of such property be not less than 10*l.* (sect. 19). In the third place, property of a leasehold tenure now confers a qualification upon the lessee or assignee, if the same be of the clear yearly value of 10*l.*, where the term was originally not less than sixty years; or 50*l.* where the term was originally not less than twenty years (sect. 20). In the fourth and last place, the right of voting at the elections of the knights of the shires was conferred by this act upon all persons who occupy any lands or tenements, and are *bonâ fide* liable as tenants thereof to a yearly rent of not less than 50*l.*, (sect. 20), such occupation being either successive or joint. (See 6 & 7 Vict. c. 18, s. 73).

twenty-one years of age[36] shall be capable of voting for any member. This extends to all sorts of members, as well for boroughs as counties; as does also the next viz. 3. That no person convicted of perjury, or subornation of perjury, shall be capable of voting in any election. 4. That no person shall vote in right of any freehold, granted to him fraudulently to qualify him to vote. Fraudulent grants are such as contain an agreement to re-convey, or to defeat the estate granted; which agreements are made void, and the estate is absolutely vested in the person to whom it is so granted[37]. And to guard the better against such frauds, it is farther provided, 5. That every voter shall have been in the actual possession, or receipt of the profits, of his freehold to his own use for twelve calendar months before; except it came to him by descent, marriage settlement, will, or promotion to a benefice or office[38]. 6. That no person shall vote in respect of an annuity or rent-charge, unless registered with the clerk of the peace twelve calendar months before[39]. 7. That in mortgaged or

(36) To these must be added persons convicted of bribery at any election, outlaws, felons, aliens, lunatics, idiots, women, and peers, except Irish peers eligible to sit in the House of Commons.

(37) And every person preparing or executing such agreement or voting under any such qualification is liable to a penalty of 40*l*. (10 Ann. c. 23, s. 1). By 12 Ann. st. 1, c. 5, it is enacted, that the 10 Anne shall not extend to persons voting in respect of tithes, rents, or other incorporeal hereditaments, or of any messuages or lands in extra-parochial places or of any chambers in the inns of Court or Chancery or of places or offices not usually charged to the public taxes.—It is observable that the legislature has never made any provision to protect itself against conveyances for conferring colourable qualifications to sit in the House of Commons. With respect to such conveyances, however, Lord Kenyon held, that a bill in equity could not be sustained to recover property conveyed for such or any similar purpose; a decision approved of by Lord Eldon (6 Ves. 747), and the present Lord Chancellor (7 Jurist, 687).

(38) But now by 2 & 3 Wm. 4, c. 45, s. 26, all persons who claim to vote in respect of freehold, copyhold, customary-hold, or ancient demesne qualifications must have been in the actual possession thereof, or in the receipt of its rents and profits for six calendar months, at least, next previous to the last day of July, in the year in which they are registered; and those who claim in respect of leasehold or occupancy qualifications must have been in such receipt or possession for twelve calendar months next before the same period, unless they have acquired such property by descent, succession, marriage, &c.

(39) The 3 Geo. 3, c. 24, by which this was made necessary, is repealed by 6 & 7 Vict. c. 18, s. 72, by which statute also all the clauses of the Reform Act relating to the registration

trust estates, the person in possession under the above-mentioned restrictions, shall have the vote[40]. 8. That only one person shall be admitted to vote for any one house or tenement, to prevent the splitting of freeholds[41]. 9. That no estate shall qualify a voter, unless the estate has been assessed to some land tax aid, at least twelve months before the election[42]. 10. That no tenant by copy of court-roll shall be permitted to vote as a freeholder[43]. Thus much for the electors in counties.

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of electors were repealed, and new provisions enacted for the same purpose. Those relating to the lists of county electors are shortly as follows: The overseers of all parishes and townships are required on or before the 20th of June in every year, to prepare lists of all persons claiming to vote in the election of knights of the shire in respect of property situate within their respective parishes or townships (sect. 4). Any of the names in these lists may be objected to either by the overseer (sect. 5), or by any other person on the county register (sect. 7). These lists of claimants and objections are to be delivered to the clerk of the peace for the county on or before the 29th of August (sect. 9). They are then revised, and the validity of all objections to the names contained therein decided upon, by barristers appointed for that purpose (sect. 28—41). An appeal is given to the Court of Common Pleas from the revising barristers' decisions on points of law (sect. 42—45). After having been revised, the lists are transmitted by the barrister to the clerk of the peace, to be arranged and the names of the voters to be copied alphabetically in a book (sect. 47), which book becomes the register of the voters for that county for the ensuing year (sect. 49).

(40) By 2 & 3 Wm. 4, c. 45, s. 23, explained by 6 & 7 Vict. c. 18, s. 74, it is enacted, that no mortgagee shall have any vote in respect of the mortgaged estate unless he be in the actual possession or receipt of the rents and profits thereof, but that the mortgagor in actual possession or receipt of the rents and profits thereof, may vote for the same notwithstanding such mortgage; and that no trustee shall have any vote in respect of any trust estate, but that the *cestui que trust* in actual possession or on the receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee, may vote for the same, notwithstanding such trust.

(41) This is only where the splitting of the freehold was for the purpose of multiplying voices at an election. The 7 & 8 Wm. 3, c. 25, s. 7, has been extended to devises for such purposes, which are consequently void. (See 53 Geo. 3, c. 49).

(42) Repealed by 2 & 3 Wm. 4, c. 45, s. 22.

(43) This disqualification has been removed by 2 & 3 Wm. 4, c. 45, s. 19, vide supra, note 35, p. 172.

By 2 & 3 Wm. 4, c. 45, s. 24, no person can vote at a county election in respect of any freehold occupied by himself; nor (sect. 25) in respect of any copyhold, customary or ancient demesne, land, or as lessee, assignee, or occupying tenant, if the property would confer a borough qualification under the Reform Act.

To the general disqualifications already enumerated must also be added the following:—

Electors of citizens and burgesses.

As for the electors of citizens and burgesses, these are supposed to be the mercantile part or trading interest of this kingdom. But as trade is of a fluctuating nature, and seldom long fixed in a place, it was formerly left to the crown to summon, *pro re nata*, the most flourishing towns to send representatives to parliament. So that as towns increased in trade, and grew populous, they were admitted to a share in the legislature. But the misfortune is, that the deserted boroughs continued to be summoned, as well as those to whom their trade and inhabitants were transferred; except a few which petitioned to be eased of the expense, then usual, of maintaining their members: four shillings a-day being allowed for a knight of the shire, and two shillings for a citizen or burgess; which was the rate of wages established in the reign of Edward III[q]. Hence the members for boroughs now bear above a quadruple proportion to those for counties, and the number of parliament men is increased since Fortescue's time, in the reign of Henry the Sixth, from 300 to upwards of 500, exclusive of those for Scotland. The universities were in general, not empowered to send burgesses to parliament; though once, in 28 Edw. I., when a parliament was summoned, to consider of the king's right to Scotland, there were issued writs which required the university of Oxford to send up four or five, and that of Cambridge two or three, of their most discreet and learned lawyers for that purpose[r]. But it was king James the First who indulged them with the permanent privilege to send constantly two of their own body; to serve for those students, who, though useful members of the community, were neither concerned in the landed nor the trading interest; and to protect in the legislature the rights of the republic of letters[44] The

[q] 4 Inst. 46.

[r] Prynne Parl. Writs, 1, 345.

1. The receipt of parochial relief within twelve months next previous to the 31st of July, in the year of registration, 2 & 3 Wm. 4, c. 45, ss. 33, 36.

2. The being employed in managing or collecting the revenue as excise, customs, post-office, &c. (22 Geo. 3, c. 41; 27 Geo. 3, c. 26, s. 15; 43 Geo. 3, c. 25; 51 Geo. 3, c. 84; 7 & 8 Geo. 4, c. 53, s. 9).

3. The being a police magistrate or otherwise employed under the Police Act. (51 Geo. 3, c. 119; 10 Geo. 4, c. 44 & 45; 2 & 3 Vict. c. 71, s. 6).

4. The having been employed and paid by any candidate at or within six months before or fourteen days after the election, as counsel, agent, attorney, &c. (7 & 8 Geo. 4, c. 37, s. 1).

(44) The universities are not in any manner affected by the Reform Act. (Vide sect. 78).

right of election in boroughs is various[45], depending entirely on the several charters, customs, and constitutions of the res-

(45) We must now notice the changes introduced by the Reform Act into the qualifications of electors for cities and boroughs. These qualifications may now be most conveniently classed as follows:—

1. Those newly created.

2. Those reserved (under certain conditions) in perpetuity.

3. Those reserved (under certain conditions) for a time.

1. The franchise of the first class, is defined chiefly by the 27th sect. Every person claiming it must occupy, within a city or borough sending representatives or within some place sharing in the election for such city or borough, as owner or tenant, some house or other building being (either separately or jointly with any land within such borough, &c. occupied therewith by the claimant as owner or as tenant under the same landlord), of the clear yearly value of not less than 10*l.* Like all other franchises, due registration is essential to the validity of the borough franchise; and to be entitled to be registered, the claimant must have occupied the premises conferring the qualification for twelve months next previous to the 31st of July, in the year of registration;—been liable to be rated to the relief of the poor in respect of the same premises during the same period;—and must have paid on or before the 20th of July, in such year, all the rates and assessed-taxes, which he shall have been called upon to pay in respect of such premises previously to the 6th of April then next preceding. (2 & 3 Wm. 4, c. 45, s. 27, explained by 6 & 7 Vict. c. 18, s. 75). He must also have resided for six months next previous to the 31st of July in such year within the said city or borough or within seven statute miles thereof (2 & 3 Wm. 4, c. 45, s. 27), explained by (6 & 7 Vict. c. 18, s. 76). It is also provided (sect. 28), that the premises conferring the qualification may be different premises occupied as above, but in succession; or (sect. 29) jointly with other owners or tenants. Nevertheless a change of premises after the 31st of July, and before the election, will deprive the party of his vote. (6 & 7 Vict. c. 18, s. 79).

2. The elective franchises reserved in perpetuity (by sect. 31), are those of all freeholders and burgage tenants in cities or towns, being counties of themselves, where the elective right resides in both or either of these classes of voters (sect. 31); of all burgesses and freemen, and of the freemen and liverymen of the city of London (sect. 32). But these are all subject to the condition of being duly registered, which no freeholder or burgage tenant is entitled to claim unless he has been in possession or in receipt of the rents and profits of his freehold or burgage tenement for twelve months next previous to the 31st of July of the year of registration, and has also resided for six months next previous to that day within the city or town or within seven miles thereof (sect. 31); except when the qualifying freehold or burgage tenement has come to the claimant by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice or office within twelve months before such 31st of July (sect. 31). This section, however, does not extend to freeholders for life or lives. These, by the 18th section, cannot vote unless they satisfy one or other of the three following conditions; *viz.*, either be in the actual and *bonâ fide* occupation of the property conferring the qualification;—have acquired the property by marriage, marriage settlement, devise, or promotion to some benefice or office;—or the property must be of the clear value of 10*l.* a-year above all rents and

pective places, which has occasioned infinite disputes; though
[175] now by statute 2 Geo. II. c. 24, the right of voting for the

charges. But, as in the case of county electors, existing freeholders for life or lives are excepted from the operation of the act if duly registered. In order to entitle any burgess, freeman, or freeman and liveryman in the city of London to registration, his qualification as such must on the 31st of July in the year in which he is registered be as complete and perfect, as, according to the law before the Reform Act, it was required to be on the day of election; and he must also have resided for six months next previous to such 31st of July within the said city or borough or within seven miles thereof. But this reservation does not extend to burgesses or freemen in respect of any other right than birth or servitude, who shall have become so subsequently to the 1st of March, 1831; or to burgesses or freemen in respect of birth, unless the person from whom such right was originally derived actually was, or was entitled to be admitted a burgess or freeman before the 1st of March, 1831, or unless such person became a burgess or freeman in respect of servitude subsequently to that day. (sect. 82).

3. With respect to the third and last class of voters; *viz.*, those whose rights have been reserved, subject to certain conditions, for a time, it is provided by the 33rd section, explained by 6 & 7 Vict. c. 18, s. 78, that all persons, who, on the 7th of June, 1832, had a right to vote for any city or borough not disfranchised by the act, in virtue of any qualification not included among those, which, by the previous sections, have been declared to be permanent,—shall, (subject to the condition of registration), retain the right of voting for such city or borough, so long as he shall be qualified as an elector according to the usages and customs of that particular city or borough or any law then in force. In order to entitle any such person to be registered, his qualification as such must, on the 31st of July in the year of registration, be as complete and perfect, as, before the act, it was required to be on the day of election,—and he must also have resided for six calendar months next previous to such 31st of July, within the said city or borough or within seven miles thereof. The operation of this section is, however, somewhat narrowed by the 35th section, which enacts, that no person shall be entitled to vote in the election for any city or borough (except a city or town being a county of itself in which freeholders or burgage tenants have a right to vote), in respect of any freehold or burgage tenement which he shall have acquired subsequently to the 1st of March, 1831, unless it shall have been acquired by him between that day and the 7th of June, 1832, by descent, succession, marriage, marriage settlement, devise, or promotion to any office or benefice. By the recent Registration Act (6 & 7 Vict. c. 18) provisions somewhat similar to those already mentioned in note 39, p. 173, have been made for the yearly preparation and revision of lists of the electors for cities and boroughs, (sect. 10—22). The electors, however, are not required to make claim, in the first instance, to be inserted in the list of voters as in the case of the county lists. The lists of the 10*l.* householders are to be made out by the overseers on or before the 31st of July (sect. 13); but those of the freemen by the town clerks (sect. 14), and those of the freemen and liverymen of London by the clerks of the several livery companies (sect. 20). The lists also, when revised and completed, are not transmitted to the sheriff of the county, but are kept by the returning-officer of the borough (sect. 48).

future shall be allowed according to the last determination of the house of commons concerning it[46]. And by statute 3 Geo. III. c. 15, no freeman of any city or borough (other than such as claim by birth, marriage, or servitude) shall be entitled to vote therein, unless he hath been admitted to his freedom twelve calendar months before[47].

Qualifications of the elected.

Next, as to the qualifications of persons to be *elected* members of the house of commons. Some of these depend upon the law and custom of parliaments, declared by the house of commons[r]; others upon certain statutes. And from these it appears, 1. That they must not be aliens born[s], or minors[t48]. 2. That they must not be any of the twelve judges[u], because they sit in the lords' house[49]; nor of the clergy[w], for they sit in the convocation[50]; nor persons attainted of treason or

[r] 4 Inst. 47, 48.
[s] See page 162.
[t] Ibid.
[u] Com. Journ. 9 Nov. 1605.
[w] Com. Journ. 13 Oct. 1553; 8 Feb. 1620; 17 Jan. 1661.

(46) This act being merely retrospective, it was provided by s. 27 of 28 Geo. 3, c. 52, and 34 Geo. 3, c. 83, that all decisions of committees of the House of Commons, with respect to the right of election or of choosing or appointing the returning officer, shall be final and conclusive upon the subject for ever.

(47) By 26 Geo. 3, c. 100, inhabitants paying scot and lot, inhabitant householders, housekeepers, and potwallers, whether legally settled or not, and inhabitants generally (other than such as claim to vote as aforesaid, by descent, devise, marriage, marriage settlement, promotion to any office or benefice, or under any other description than inhabitants paying scot and lot, or inhabitants as herein described) must have been actually and *bonâ fide* inhabitants within the borough for six calendar months previous to the day of election.

(48) To which may be added, denizens or naturalized aliens (12 & 13 Wm. 3, c. 2; 1 Geo. 1, st. 2, c. 4, s. 2), idiots, lunatics (D'Ewes, 126), and outlaws in criminal prosecutions (Com. Journ. 1623, 1625). Persons guilty of bribery or treating at the elections for any county or borough, are incapable of sitting for such county or borough during such parliament. (7 & 8 Wm. 3, c. 25; 49 Geo. 3, c. 118; 5 & 6 Vict. c. 102, s. 22).

(49) For which reason representative peers of Ireland (39 & 40 Geo. 3, c. 67) are also excluded. Judges of Scotland (7 Geo. 2, c. 16, s. 4) and of Ireland (1 & 2 Geo. 4, c. 44), are also excluded from the House of Commons; as are also judges in bankruptcy (1 & 2 Wm. 4, c. 56, s. 60), and judges of the Admiralty (3 & 4 Vict. c. 66).

(50) That the clergy should be excluded from the House of Commons, because they sit in the convocation, seems scarcely a sufficient reason even when the convocation was in full vigour, for the beneficed clergy alone voted for the proctors or representatives. But, perhaps, the unbeneficed clergy might console themselves with the doctrine of "virtual representation." The convocation, however, had been virtually defunct since 1717, upwards of forty

felony[x], for they are unfit to sit any where. 3. That sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers[y]; but that the sheriffs of one county are eligible to be knights of another[z51]. 4. That, in strictness, all members ought to have been inhabitants of the place for which they are chosen[a]: but this, having been been long disregarded, was at length entirely repealed by statute 14 Geo. III. c. 58. 5. That no persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury[b], nor any of the officers following[c], (*viz.* commissioners of prizes, transports, sick and wounded, wine licences, navy, and victualling; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of Minorca or Gibraltar; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hackney coaches, hawkers and pedlars,) nor any persons that hold any new office under the crown created since 1705[d], are capable of being elected or sitting as members[52]. 6. That no person having a pension

[176]

[x] Com. Journ. 21 Jan. 1580. 4 Inst. 47.

[y] Bro. Abr. t. parliament, 7; Com. Journ. 25 June, 1604; 14 Apr. 1614; 22 Mar. 1620, 2, 4; 15 Jun.; 17 Nov. 1685. Hal. of parl. 114.

[z] 4 Inst. 48. Whitelocke of parl. ch. 99, 100, 101.

[a] Stat. 1 Hen. V. c. 1. 23 Hen. VI. c. 15.

[b] Stat. 5 & 6 W. & M. c. 7.

[c] Stat. 11 & 12 Wm. III. c. 2; 12 & 13 Wm. III. c. 10; 6 Anne, c. 7; 15 Geo. II. c. 22.

[d] Stat. 6 Anne, c. 7.

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years before the Commentaries were published. In 1801, on the election of Mr. Horne Tooke (who had taken priest's orders early in life) for Old Sarum, a committee of the House of Commons was appointed to search for precedents respecting the eligibility of the clergy to be returned to parliament; and it being found that persons had been returned with the addition "clericus" to their names, the 41 Geo. 3, c. 63, was passed to disqualify all persons, having been ordained to the office of priest or deacon, or ministers of the church of Scotland, from serving in parliament in the House of Commons; a disability which was subsequently extended to persons in holy orders in the church of Rome. (10 Geo. 4, c. 7, s. 9).

(51) See also 1 Doug. 419; 4 Doug. 87.

(52) That is while they hold those offices. To the above list may be added contractors for the public service (22 Geo. 3, c. 45); commissioners

under the crown during pleasure, or for any term of years, is capable of being elected or sitting[e]. 7. That if any member accepts an office under the crown, except an officer in the army or navy accepting a new commission, his seat is void; but such member is capable of being re-elected[f] [53]. That all knights of the shire shall be actual knights, or such notable esquires and gentlemen as have estates sufficient to be knights, and by no means of the degree of yeomen[g]. This is reduced to a still greater certainty, by ordaining, 9. That every knight of a shire shall have a clear estate of freehold or copyhold, to the value of six hundred pounds *per annum*, and every citizen and burgess to the value of three hundred pounds; except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities[h]: which somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men: and of this qualification the member must make oath, and give in the particulars in writing, at the time of taking his seat[i] [54]. But subject to these [177] standing restrictions and disqualifications, every subject of the realm is eligible of common right: though there are instances, wherein persons in particular circumstances have forfeited that common right, and have been declared ineligible, *for that*

[e] Stat. 6 Anne, c. 7; 1 Geo. 1, st. 2, c. 56.
[f] Stat. 6 Anne, c. 7.
[g] Stat. 23 Hen. VI. c. 14.
[h] Stat. 9 Anne, c. 5.
[i] Stat. 33 Geo. II. c. 20.

for auditing public accounts (25 Geo. 3, c. 52, s. 25, and 54 Geo. 3, c. 184, s. 14); police magistrates (51 Geo. 3, c. 119; 3 Geo. 4, c. 55, s. 14; 10 Geo. 4, c. 44, s. 18); all the commissioners of woods and forests, except one (10 Geo. 4, c. 50, s. 21; 2 & 3 Wm. 4, c. 1); revising barristers, for eighteen months from the time of their appointment (2 & 3 Wm. 4, c. 45, s. 41, 49); commissioners for the commutation of tithes (6 & 7 Wm. 4, c. 71, s. 5), and many other public officers enumerated Rog. Elec. chap. 2.

(53) If the office be one created before 1705.

(54) By 1 & 2 Vict. c. 48, every species of property, whether real or personal, yielding the above yearly incomes, now confers a qualification. By the same act, candidates may be required to make a declaration at the time of election, that they are possessed of such qualification; and the successful candidate must deliver in at the table of the House of Commons, before he takes his seat or votes, a statement of his qualification, and make a declaration that according to the best of his knowledge and belief he is duly qualified to be elected as a member of the House of Commons, according to the true intent and meaning of the said act of parliament.

parliament by a vote of the house of commons[j], or *for ever* by an act of the legislature[k]. But it was an unconstitutional prohibition which was grounded on an ordinance of the house of *lords*[l], and inserted in the *king's* writs, for the parliament holden at Coventry, 6 Hen IV. that no apprentice or other man of the law should be elected a knight of the shire therein[m]: in return for which, our law books and historians[n] have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament; and sir Edward Coke observes with some spleen[o], that there never was a good law made thereat[55].

Method of proceeding in elections.

3. The third point, regarding elections, *is the method of proceeding therein.* This is also regulated by the law of parliament, and the several statutes referred to in the margin[p]: all which I shall blend together, and extract out of them a summary account of the method of proceeding to elections.

As soon as the parliament is summoned the lord chancellor (or if a vacancy happens during the sitting of parliament, the speaker, by order of the house; and without such order, if a vacancy happens[56] by death, or the member's becoming a peer,

[j] See page 163.

[k] Stat. 7 Geo. I. c. 28.

[l] 4 Inst. 10, 48; Pryn. plea for lords, 379; 2 Whitelocke, 359, 368.

[m] Pryn. on 4 Inst. 13.

[n] Walsing. A D. 1405.

[o] 4 Inst. 48.

[p] 7 Hen. IV. c. 15; 8 Hen. VI. c. 7; 23 Hen. VI. c. 14; 1 W. & M. st. 2, c. 2; 2 W. & M. st. 1, c. 7; 5 & 6 W. & M. c. 20; 7 Wm. III. c. 4; 7 & 8 Wm. III. c. 7, and c. 25; 10 & 11 Wm. III. c. 7; 12 & 13 Wm. III. c. 10; 6 Anne, c. 23; 9 Anne, c. 5; 10 Anne, c. 19, and c. 23; 2 Geo. II. c. 24; 8 Geo. II. c. 30; 9 Geo. II. c. 38; 18 Geo. II. c. 18; 19 Geo. II. c. 28; 10 Geo. III. c. 16; 11 Geo. III. c. 42; 14 Geo. III. c. 15; 15 Geo. III. c. 36; 28 Geo. III. c. 52.

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(55) This is not the only attempt which has been made to exclude lawyers from parliament. In the 46 Edw. 3, the clause, known by the name of the nolumus clause, was first inserted in the writs; and on several subsequent occasions attempts have been made to put it into force. On the occasion mentioned in the text, Walsingham says, that all the lawyers being thus excluded from the parliament held in the 6 Hen. 4, "the king's demands were by that means obtained; and by that parliament was granted an unusual tax (*tricabilis et valde gravis*), of which I would have set down the particulars, had not the authors thereof concealed it for ever from posterity by causing the papers to be burnt."

In the year 1649, a motion was made to exclude lawyers from the parliament, by enforcing the nolumus clause, and the speech of Bulstrode Whitelocke, in opposition thereto, contains much curious information on the subject. (Parl. Hist. i. 1341).

(56) The 24 Geo. 3, sess. 2, c. 26, repeals the former acts on this subject, and provides, that if during any recess,

in the time of a recess for upwards of twenty days) sends his warrant to the clerk of the crown in chancery; who thereupon issues out writs to the sheriffs of every county, for the election of all the members to serve for that county, and every city and borough therein. Within three days[57] after the receipt of this writ, the sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs, commanding them to elect their members: and the said returning officers are to proceed to election within eight days from the receipt of the precept, giving four days' notice of the same[q 58]; and to return the persons chosen, together with the precept to the sheriff. [178]

But elections of knights of the shire must be proceeded to by the sheriffs themselves in person, at the next county court that shall happen after the delivery of the writ[59]. The county

[q] In the borough of New Shoreham in Sussex, wherein certain freeholders of the county are entitled to vote by statute 11 Geo. III. c. 55, the election must be within *twelve* days, with *eight* days' notice of the same[60].

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any two members give notice to the speaker, by a certificate under their hands, that there is a vacancy by death, or elevation to the peerage of any number, the speaker shall forthwith give notice of it in the Gazette, and fourteen days afterwards shall issue his warrant to the clerk of the crown, commanding him to make out a new writ for the election of another member. And to prevent any impediment by the speaker's absence from the kingdom, or by the vacancy of his seat, at the beginning of every parliament, he shall appoint any number of members from three to seven inclusive, who shall have the same authority in the speaker's absence. In case of a vacancy happening during the sitting of parliament, by the death, &c. of any member, the speaker is to issue by order of the house, his warrant to the clerk of the crown for a new writ (Resolutions of the House, 18th March, 1800-1, Com. Journ.) As to vacancies created by the bankruptcy of members, see 52 Geo. 3, c. 144.

(57) The officer of the Cinque Ports has six days. (10 & 11 Wm. 3, c. 7).

(58) In the case of cities and towns being counties, the sheriff, and in all other cities and boroughs, the returning-officer, must give three clear days' notice at least, before he proceeds to the election. (3 & 4 Vict. c. 81).

(59) This is altered by the 25 Geo. 3, c. 84, which provides that the sheriff shall within two days after receipt of the writ, cause proclamation to be made

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(60) Special provisions have been enacted, with respect to some other boroughs, as Cricklade in Wiltshire, Aylesbury in Buckinghamshire, East Retford in Nottinghamshire (see 22 Geo. 3, c. 31; 44 Geo. 3, c. 60; and 1 Wm. 4, c. 74). The right of voting in these boroughs is now regulated by 2 & 3 Wm. 4, c. 45, s. 33, 34.

court is a court held every month or oftener by the sheriff, intended to try little causes not exceeding the value of forty shillings, in what part of the county he pleases to appoint for that purpose: but for the election of knights of the shire it must be held at the most usual place[61]. If the county court

at the place where the election ought to be made, of a special county court to be there held, for the purpose of such election only, on any day (Sunday excepted), not later from the day of making such proclamation than the 16th day, nor sooner than the 10th; and that he shall proceed at such special county court in the same manner as at an election at a county court under the former laws.

(61) (7 & 8 Wm. 3, c. 25). But the places are now fixed by 2 & 3 Wm. 4, c. 45, ss. 12, 13, 14, and 16, and the Boundary Act, 2 & 3 Wm. 4, c. 64. (See also 27 Hen. 8, c. 26; 35 Geo. 3, c. 72). Additional polling places are to be provided when necessary. (See 2 & 3 Wm. 4, c. 45, ss. 63, 64; 6 & 7 Wm. 4, c. 102). As to boroughs, see 2 & 3 Wm. 4, c. 45, ss. 48, 68, and 5 & 6 Wm. 4, c. 36.

With respect to the duration of the polling, it was enacted by the Reform Act, that at any contested election for knights of the shire, the polling should commence at nine o'clock in the forenoon of the next day but two after the day fixed for the election, and be carried on simultaneously at the principal place of election, and at all the other polling places, and continue for two days only, such days being successive days; and on the first day the polling should continue for seven hours, and on the second day for eight hours, and should close not later than four in the afternoon of the second day (sect. 62). Sect. 67 regulated the duration of the poll in borough elections, but by 5 & 6 Wm. 4, c. 36, their duration has been limited to one day only. (See also 6 & 7 Wm. 4, c. 102).

The political influence of the people is, in no slight degree, affected by the manner of their meeting at elections. "William the Conqueror, by enacting a law like the Capitulary of Charlemagne (which directed a roofed building to be constructed for holding the public mallum, and which, whether designedly or not, converted the popular assemblies, from conventions of the people into mere courts of justice), would have more effectually checked the growth of the influence of the English people, than by erecting all the massy dungeon towers, whose ruins are yet frowning over the land. If, instead of causing the men of Kent to assemble on the wide heath of Pennenden, he had commanded them to meet in the speech-house of Canterbury, the elections of knights of the shire would now, at this day, be made by a close corporation. The records exist which shew that as the suffrage of the borough belonged to the delegated bodies acting on the part of the community, so the choice of the representative of the county, or rather of the county court, belonged to the magnates or their delegates, few in number, high in station, and without any commixture of the minor suitors, who continued spectators, until they acquired a deep and general interest in the proceedings of the legislature and in the affairs of the community. They then became loud and active partizans; they were on the spot; they mingled with their superiors; they asserted the same rights; but 'the great, outrageous, and excessive number of people, of small substance and of no value,' would never in the angry words of the statute of 8 Hen. 6, c. 7, have 'pretended to a voice equivalent with the most worthy knights and esquires,' if the English

falls upon the day of delivering the writ, or within six days after, the sheriff may adjourn the court and election to some other convenient time, not longer than sixteen days, nor shorter than ten; but he cannot alter the place, without the consent of all the candidates; and, in all such cases, ten days' public notice must be given of the time and place of the election.

Undue influence.

And, as it is essential to the very being of parliament, that elections should be absolutely free, therefore all undue influences upon the electors are illegal, and strongly prohibited. For Mr. Locke[r] ranks it among those breaches of trust in the executive magistrate, which according to his notions amount to a dissolution of the government, "if he employs the force, treasure, and offices of the society to corrupt the representatives, or openly to pre-engage the electors, and prescribe what manner of persons shall be chosen. For thus to regulate candidates and electors, and new-model the ways of election, what is it (says he) but to cut up the government by the roots, and poison the very fountain of public security?" As soon therefore as the time and place of election, either in counties or boroughs, are fixed, all soldiers quartered in the place are to remove, at least one day before the election to the distance of two miles or more; and not to return till one day after the poll is ended[62]. Riots likewise have been frequently determined to make an election void[63]. By vote also of the house of commons, to whom alone belongs the power of determining contested elections, no lord of parliament, or lord lieutenant of a county, hath any right to interfere in the election of commoners; and, by statute, the lord warden of the cinque ports

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[r] On. Gov. p. 2, § 222.

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sheriff had been enabled to close the door upon the unwelcome intruders."—[PALGRAVE].

In county elections on the day next but one, and in borough elections on the day next, after the close of the poll, the returning-officer is to open the poll-books and declare the state of the poll, and make proclamation of the member or members chosen. (2 & 3 Wm. 4, c. 45, ss. 65, 68).

(62) Except the guards in the liberty of Westminster or in Southwark, or other place of royal residence, or in any fort or garrison, in respect of such number of soldiers whereof the garrison is composed, or in respect of any soldier or officer entitled to vote at such election. (8 Geo. 2, c. 30).—[CHITTY].

(63) In case of riot the returning-officer may now adjourn the poll (2 & 3 Wm. 4; c. 45, s. 70).

shall not recommend any members there. If any officer of the excise, customs, stamps, or certain other branches of the revenue[64], presume to intermeddle in elections, by persuading any voter, or dissuading him, he forfeits 100*l.* and is disabled to hold any office.

Bribery and corruption.

Thus are the electors of one branch of the legislature secured from any undue influence from either of the other two, and from all external violence and compulsion. But the greatest danger is that in which themselves co-operate, by the infamous practice of bribery and corruption. To prevent which it is enacted, that no candidate shall, after the date (usually called the *teste*) of the writs, or after the vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons, or to the place in general, in order to his being elected: on pain of being incapable to serve for that place in parliament. And if any money, gift, office, employment, or reward be given or promised to be given to any voter, at any time, in order to influence him to give or withhold his vote, as well he that takes as he that offers such bribe, forfeits 500*l.*[65], and is for ever disabled from voting and holding any office in any corporation, unless, before conviction, he will discover some other offender of the same kind, and then he is indemnified for his own offence[a 66]. The first instance that occurs, of election bribery, was so early as 13 Eliz. when one Thomas Longe (being a simple man and
[180] of small capacity to serve in parliament) acknowledged that he had given the returning officer and others of the borough for which he was chosen four pounds to be returned member, and was for that premium elected; but for this offence the borough was amerced, the member was removed, and the

[a] In like manner the Julian law *de ambitu* inflicted fines and infamy upon all who were guilty of corruption at elections; but if the person guilty convicted another offender, he was restored to his credit again. Ff. 48, 14, 2.

(64) See 7 & 8 Geo. 4, c. 53, s. 9; and sect. 6 of the Metropolitan Police Act (2 & 3 Vict. c. 71).

(65) By 49 Geo. 3, c. 118, the person giving or promising such gift or reward to procure the election of a member of parliament shall forfeit 1000*l.* Actions for these penalties, as well as those fixed by previous statutes, must be commenced within two years after the commission of the offence (sect. 2).

(66) See 2 Geo. 2, c. 24, explained and enlarged by 9 Geo. 2, c. 38, and 16 Geo. 2, c. 11. See also 43 Geo. 3, c. 74; 49 Geo. 3, c. 118; 53 Geo. 3, c. 89, and 7 & 8 Geo. 4, c. 37.

officer fined and imprisoned[t]. But, as this practice hath since taken deeper and more universal root, it hath occasioned the making of these wholesome statutes; to complete the efficacy of which, there is nothing wanting but resolution and integrity to put them in strict execution[67].

Undue influence being thus (I wish the depravity of mankind would permit me to say, effectually) guarded against, the election is to be proceeded to on the day appointed; the sheriff or other returning officer first taking an oath against bribery, and for the due execution of his office[68]. The candidates likewise, if required, must swear[69] to their qualification; and the electors in counties to theirs; and the electors both in counties and boroughs are also compellable to take the oath of abjuration and that against bribery and corruption[70]. And it

[t] 4 Inst. 23. Hale of Parl. 112. Com. Journ. 10 and 11 May, 1571.

(67) By 4 & 5 Vict. c. 57, evidence of bribery may now be received by an election committee before requiring proof of agency. See also the act "for the better Discovery and Prevention of Bribery and Treating at Elections," (5 & 6 Vict. c. 102), by the 22nd section of which it is enacted, "that every candidate or person elected to serve in parliament for any county or borough, who shall, by himself, or by or with any person, or in any manner, directly or indirectly, give or provide, or cause or knowingly allow to be given or provided, wholly or partly at his expense, or pay wholly or in part any expenses incurred for any meat, drink, entertainment, or provision for any person, at any time, either before, during, or after any such election, for the purpose of corruptly influencing such person, or any other person, to give or to refrain from giving his vote in any such election, or for the purpose of corruptly rewarding such person, or any other person, for having given or refrained from giving his vote at any such election, shall be incapable of being elected or sitting in parliament for that place during the parliament for which such election shall be holden."

(68) To be administered by a justice of the peace, or, in his absence, by three electors. (2 Geo. 2, c. 24, s. 3).

(69) A candidate may now be required to make a solemn declaration at the hustings of his being possessed of the qualification required by law, and if successful must make a similar declaration before he takes his seat or votes in the House of Commons, as well as deliver in a statement of the property conferring his qualification. (1 & 2 Vict. c. 48).

(70) The oath against bribery may still be required at the poll from all electors tendering their votes (2 Geo. 2, c. 24; 43 Geo. 3, c. 74; 2 & 3 Wm. 4, c. 45, s. 58); but the oaths of allegiance, supremacy, and abjuration, required by 7 & 8 Wm. 3, c. 27; 34 Geo. 3, c. 73; and 42 Geo. 3, c. 62, may now be dispensed with (2 & 3 Wm. 4, c. 45, s. 58; 5 & 6 Wm. 4, c. 36, s. 6). The oath, required of Roman Catholic voters by 10 Geo. 4, c. 7, has also been abolished. (See 6 & 7 Vict. c. 28).

By 6 & 7 Vict. c. 18, s. 79, the register is declared to be conclusive evi-

might not be amiss, if the members elected were bound to take the latter oath, as well as the former: which in all probability would be much more effectual, than administering it only to the electors.

The election being closed the returning officer in boroughs returns his precept to the sheriff, with the persons elected by the majority; and the sheriff returns the whole, together with the writ for the county and the knights elected thereupon, to the clerk of the crown in chancery; before the day of meeting, if it be a new parliament, or within fourteen days after the election, if it be an occasional vacancy; and this under the penalty of 500*l.* If the sheriff does not return such knights only as are duly elected, he forfeits, by the old statutes of Henry VI., 100*l.*; and the returning officer in boroughs for a like false return 40*l.*; and they are besides liable to an action, in which double damages shall be recovered, by the later statutes of king William[71]: and any person bribing the returning officer shall also forfeit 300*l.* But the members returned
[181] by him are the sitting members, until the house of commons, upon petition, shall adjudge the return to be false and illegal. The form and manner of proceeding upon such petition are now regulated by statute 10 Geo. III. c. 16, (amended by 11 Geo. III. c. 42, and made perpetual by 14 Geo. III. c. 15,) which directs the method of choosing by lot a select committee of fifteen members, who are sworn well and truly to try the

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dence that the persons therein named *continue* to possess the same qualification; and (by sect. 81) no inquiry shall be permitted at the time of polling as to the right of any person to vote, except only with reference to his identity with the person registered, and whether he has already voted at that election. An oath upon these two points may be put to him (sect. 81), but no other oaths whatever may be put to the voters, nor can any scrutiny into them be allowed by or before the returning officer (sect. 82). Persons falsely assuming to vote or aiding other persons to vote in the names of other persons, are guilty of a misdemeanor and punishable by imprisonment for two years (sect. 83, 84).

(71) By 2 & 3 Wm. 4, c. 45, s. 76, any sheriff, returning-officer, barrister, overseer, or other person wilfully contravening the provisions of the Reform Act shall forfeit 500*l.*; and by 4 & 5 Vict. c. 58, s. 95, sheriffs or other returning-officers wilfully delaying, neglecting, or refusing to return any person who ought to be returned to serve in parliament may be sued by such person, who shall recover double damages and full costs; but the action must be commenced within one year from the commission of the act on which it is grounded, or within six months after the conclusion of any proceedings in the House of Commons relating to such election.

same, and a true judgment to give according to the evidence[72]. And this abstract of the proceedings at elections of knights, citizens, and burgesses, concludes our inquiries into the laws and customs more peculiarly relative to the house of commons.

VI. I proceed now, sixthly, to the method of making laws; which is much the same in both houses: and I shall touch it very briefly, beginning in the house of commons. But first I must premise, that for dispatch of business each house of parliament has its *speaker*. The speaker of the house of lords, whose office is to preside there, and manage the formality of business, is the lord chancellor, or keeper of the king's great seal, or any other appointed by the king's commission: and, if none be so appointed, the house of lords (it is said) may elect. The speaker of the house of commons is chosen by the house; but must be approved by the king[73]. And herein the usage of the two houses differs, that the speaker of the house of commons cannot give his opinion or argue any question in the house; but the speaker of the house of lords, if a lord of parliament, may[74]. In each house the act of the majority

VI. The method of making laws.

(72) The mode of trial of controverted election was entirely altered by 4 & 5 Vict. c. 58, continued until the 31st of July, 1843, by 5 & 6 Vict. c. 73, and until the 1st of August, 1844, by 6 & 7 Vict. c. 47. By this statute the operation of the Grenville Act (10 Geo. 3, c. 16), and other acts consolidated into 9 Geo. 4, c. 22, are not repealed, but only suspended until the above mentioned date; and, in the place of the committee of fifteen members, a committee consisting of a chairman and six other members examine and determine whether the sitting member or his opponent be duly elected, or whether the election be void and a new writ ought to be issued.

(73) This approval has never been withheld since the 30 Car. II. In that year the House of Commons having elected Sir Edw. Seymour speaker, in opposition to the nominee of the court party, the king refused his approbation of their choice. After a short prorogation of parliament, the house elected a third person, whose election the court thought proper to confirm (Parl. Hist. iv. 1091—1113; Burnet. Hist. own Times, i. 275). By the 30 Geo. 3, c. 10, the salary of the speaker is fixed at 6000*l.* per annum. (See also 2 & 3 Wm. 4, c. 105, and 4 & 5 Wm. 4, c. 70, and Com. Dig. Parl. E. 5).

(74) Moreover the speaker of the House of Commons never votes but when there is an equality without his casting vote; but the speaker of the House of Lords has no casting vote, his vote being counted with the rest of the house; and in the case of an equality of votes, the non-contents or negative voices have the same effect and operation as if they were in fact a majority (Lords' Journ. 25 June, 1661), upon the principle, *semper præsumitur pro neganti*.

When the House of Commons re-

binds the whole; and this majority is declared by votes openly and publicly given: not as at Venice, and many other senatorial assemblies, privately or by ballot. The latter method may be serviceable, to prevent intrigues and unconstitutional combinations; but it is impossible to be practised with us; at least in the house of commons, where every member's conduct is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection.

Mode of bringing in a bill.

To bring a bill into the house, if the relief sought by it is of a private nature, it is first necessary to prefer a petition; which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition (when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the house; and then (or otherwise, upon the mere petition) leave is given to bring in the bill. In public matters the bill is brought in upon motion made to the house, without any petition at all. Formerly[75], all

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solves itself into a committee, the chairman of committees, who is regularly appointed at the commencement of every parliament, presides at the table; and then the speaker may for the time speak and vote as any one of the other members.

(75) So early as the reign of Edw. 2, laws had found their way to the statute roll, of which one branch or other of the legislature afterwards complained as being without, or even against, their consent. In 1322 (15 Edw. 2), an explicit declaration was made by statute of the necessity for the uncontrolled consent of the king and the three estates to every law and ordinance, and of what was understood then to be, and in former times to have been, the law and usage of the realm in this respect. This declaration, which is commonly called the Revocation of Ordinances, is not to be found in the ordinary editions of the statutes, but may be met with in the Statutes of the Realm, (vol. i. 168.) It declares, that "all matters to be established for the estate of our lord the king, and of his heirs, and for the estate of the realm, and of the people, shall be treated, accorded, and established in parliament, by our lord the king, and by the assent of the prelates, earls, and barons, and the commonalty of the realm, according as it hath been heretofore accustomed." Notwithstanding this, statute laws were still again promulgated, chiefly through the agency of the clergy, of which the commons not only did not approve, but which they had actually rejected. Under Edw. 3, the commons again remonstrated against these clerical manœuvres; but in 1381 (5 Rich. 2), the clergy had the address to put upon the roll an ordinance empowering the sheriffs of counties to assist in suppressing heresy, and punishing its abettors, which still keeps its fraudulent position in our statute book, as 5 Rich. 2, st. 2, c. 5. In the next parliament, the commons not only resisted this unconstitutional attempt at legislation, but expressed a feeling with reference to religious freedom highly creditable to themselves.

bills were drawn in the form of petitions, which were entered upon the *parliament rolls* with the king's answer thereunto

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They prayed that this pretended statute might be annulled, "for that it never was their intention to bind themselves or their descendants to the bishops, more than their ancestors had been bound in times past." The commons are as little answerable for the burning statute of 2 Hen. 4 (1400), which obtained its enactment in an equally irregular manner. How blameable soever their successors became in ultimately completing the bloody code of persecution thus begun, it is at least creditable to the people's house, that the commencement of the work not only arose elsewhere, but had their decided reprobation and opposition. In addition to these attempts of the commons to enforce their right to a fair and equal share in enacting the particular provisions as well as the substance of every statute, we may mention the celebrated Petition of Right, in 5 Rich. 2, which is doubly curious, as presenting the earliest instance of the use of the English language in the records of the House of Commons. In this document the commons state that "it had ever been their liberty and freedom that there should no statute or law be made, unless they gave thereto their assent;—that they are, and have ever been, part of the king's parliament, and be as well assenters as petitioners. They then petition the king that from that time forward, on complaint from them of any mischief asking remedy thereof by their speaker, or by petition written, there never should be any law made thereon and engrossed as statute, nor any additions, diminutions, or any manner of term or terms made in the same, whereby it should be changed from the intent and meaning asked by the speaker's mouth or the petitions aforesaid, without the assent of the said commons. To this the king of his grace especial granted, that from thenceforth nothing should be enacted to the petitions of his commons that be contrary to their asking, whereby they should be bound without their own assent."

In 1406, 8 Hen. 4, it was as a further security directed that "certain of the commons' house should be present at the engrossing of the parliament roll." In 1414 (2 Hen. 5), the commons again remonstrated against the additions to and diminutions from the statutes as passed by them, and in the same words as before, (in 1381), to which Hen. 5 made as favourable an answer as had Rich. 2. (See Ruff. Ref. xv.; Rot. Parl. 2 Hen. 5, No. 22). In the following reign (Hen. 6), an important change was introduced in the mode of passing laws. The commons then began to draw up their petitions in the form of bills, and in the words in which they wished them to be passed into laws; which bills, if consented to by the lords and the king, were entered on the statute roll by the clerk of the parliament. (See Adolphus' Pol. Stat. Brit. Emp. vol. i. 270). When all the bills of one session had been agreed to by the lords, and had received the royal assent, the enacting clause was affixed to the whole, in words nearly as follows: "The king, by the advice and consent of the lords spiritual and temporal, and at the special request of the commons, hath ordained and established," &c.; distinct titles not being prefixed to each act until the reign of Hen. 8, vide text, p. 183.

It appears by the style of the printed acts, from the time of Hen. 3 down to Hen. 7, that the king made the law, and the lords spiritual and temporal assented, at the request or petition of the commons. Sometimes the phrase, "in the said parliament assembled, and by the authority of the same parliament," was added. The form was changed at the first parliament held in

subjoined; not in any settled form of words, but as the circumstances of the case required[t]: and at the end of each parliament the judges drew them into the form of a statute, which was entered on the *statute rolls*. In the reign of Henry V., to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of the parliament; and, in the reign of Henry VI., bills in the form of acts, according to the modern custom, were first introduced.

The first and second readings.

The persons directed to bring in the bill, present it in a competent time to the house, drawn out on a paper, with a multitude of blanks, or void spaces, where any thing occurs that is dubious, or necessary to be settled by the parliament itself (such especially as the precise date of times, the nature and quantities of penalties, or of any sums of money to be raised); being indeed only the skeleton of the bill. In the house of lords, if the bill begins there, it is (when of a private nature) referred to two of the judges, to examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety[76]. This is read a first time, and at a convenient distance a second time; and after each reading the speaker opens to the house the substance of the bill, and puts the question, whether it shall proceed any farther[77]? The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and, if the opposition succeeds, the bill must be dropped for that session: as it must also, if opposed with success in any of the subsequent stages[78].

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The committee.

After the second reading it is committed, that is, referred to a committee, which is either selected by the house in matters of small importance, or else, upon a bill of consequence, the

[t] See among numberless instances, the *articuli cleri*, 9 Edw. II.

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the reign of Hen. 7; the commons thenceforth having their assent to the passing of laws expressed as well as that of the lords. The form now used is, "be it enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same."

(76) 41 Geo. 3, c. 105; Com. Dig. Parl. G. 11.

(77) Com. Dig. Parl. G. 12, 13, 14.

(78) In either house, or if the royal assent be refused. (Com. Dig. Parl. G. 15).

house resolves itself into a committee of the whole house[79]. A committee of the whole house is composed of every member; and, to form it, the speaker quits the chair (another member being appointed chairman), and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new-modelled. After it has gone through the committee, the chairman reports it to the house with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the house hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be engrossed, or written in a strong gross hand, on one or more long rolls (or presses) of parchment sewed together[80]. When this is finished, it is read a third time, and amendments are sometimes then made to it; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a ryder[u]. The speaker then again opens the contents; and holding it up in his hands, puts the question, whether the bill shall pass? If this is agreed to, the title to it is then settled; which used to be a general one for all the acts passed in the session, till in the first year of Henry VIII. distinct titles were used for each chapter. After this, one of the members is directed to carry it to the lords, and desire their concurrence; who, attended by several more, carries it to the bar of the house of peers, and there delivers it to their speaker, who comes down from his woolsack to receive it[81].

Proceedings in the other house.

It there passes through the same forms as in the other house (except engrossing, which is already done), and, if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the lords send a message by two masters in chancery (or upon matters of high dignity and importance, by two of the judges), that they have agreed to the same: and the bill remains with the lords

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[u] Noy, 84.

(79) Com. Dig. Parl. G. 13. (80) Ibid. G. 16.

(81) Ibid. G. 19.

if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the bill, to receive the concurrence of the commons[82]. If the commons disagree to the amendments, a conference usually follows between members deputed from each house; who for the most part settle and adjust the difference[83]: but, if both houses remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords. But, when an act of grace or pardon is passed, it is first signed by his majesty, and then read once only in each of the houses, without any new engrossing or amendment[w]. And when both houses have done with any bill, it is always deposited in the house of peers, to wait the royal assent; except in the case of a bill of supply, which after receiving the concurrence of the lords is sent back to the house of commons[x].

The royal assent.

The royal assent may be given in two ways: 1. In person; when the king comes to the house of peers, in his crown and royal robes, and sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the king's answer is declared by the clerk of the parliament in Norman-French: a badge, it must be owned (now the only one remaining), of conquest; and which one could wish to see fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, having once been destroyed by a foreign force. If the king consents to a public bill, the clerk usually declares, "*le roy le veut*, the king wills it so to be;" if to a private bill, "*soit fait comme il est desiré*, be it as it is desired." If the king refuses his assent, it is in the gentle language of "*le roy s'avisera*[84], the king will

[w] D'Ewes' Journ. 20, 73. Com. Journ. 17 June, 1747.
[x] Com. Journ. 24 July, 1662.

(82) Com. Dig. Parl. G. 20.

(83) Ibid. G. 24.

(84) These words correspond with the phrase used by courts of justice, when they require time to consider of their judgment, viz. *curia advisare vult*. And there can be little doubt but that originally these words "*le roi s'avisera*" implied a serious intent to take the subject under consideration, and only became in effect a negative, when the bill or petition was annulled by a dissolution, before the king communicated the result of his deliberation: for in

advise upon it." When a bill of supply is passed, it is carried up and presented to the king by the speaker of the house of commons[y]; and the royal assent is thus expressed, "*le roy remercie ses loyal subjects, accepte leur benevolence, et aussi le veut*, the king thanks his loyal subjects, accepts their benevolence, and wills it so to be." In case of an act of grace, which originally proceeds from the crown, and has the royal assent in the first stage of it, the clerk of the parliament thus pronounces the gratitude of the subject; "*les prelats, seigneurs, et commons, en ce present parliament assemblés au nom de touts vous autres subjects, remercient tres humblement votre majesté, et prient a Dieu vous donner en santé bone vie et longue;* the prelates, lords, and commons, in this present parliament assembled, in the name of all your other subjects, most humbly thank your majesty, and pray to God to grant you in health and wealth long to live[z]." 2. By the statute 33 Hen. VIII. c. 21, the king may give his assent by letters patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the high [185]

[y] Rot. Parl. 9 Hen. IV. in Pryn. 4 Inst. 30, 31.
[z] D'Ewes' Journ. 35.

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the rolls of parliament the king sometimes answers, that the petition is unreasonable, and cannot be granted; sometimes he answers, that he and his council will consider of it; as in 37 Edw. 3, No. 33. (See further Com. Dig. Parliament, G. 21.) On one occasion this prerogative of rejecting bills was exercised by queen Elizabeth at the close of one session, and to the extent of rejecting forty-eight bills, while she gave her assent to twenty-four public, and nineteen private bills, which had passed both houses of parliament (D'Ewes, 596). But the last time it was exercised was in the year 1692, by Wm. 3, who at first refused his assent to the bill for triennial parliaments, to which however he gave the royal assent two years afterwards. (De Lolme, 404). During the disputes between Car. 1 and the long parliament, it was carried in the House of Commons by a majority of 103 to 61, that on the true grammatical construction of the Latin form of the coronation oath, the king had no power of rejecting bills, but was bound to sanction all laws consented to by both houses of parliament. (Parl. Hist. i. 1302). The words of the form in question are: "*concedis justas leges et consuetudines esse tenendas, et promittis per te eas esse protegendas et ad honorem dei corroborandas, quas vulgus elegerit, secundum vires tuas?*" This form of the oath is taken from the statute 15 Edw. 2. It occurs again in the reign of Hen. 4, (Hallam. Const. Hist. ii. 180, note). The fact that the form occurs for the first time in 15 Edw. 2 (the Revocation of Ordinances Act) corroborates Mr. Hallam's remark that the reason for the introduction of the clause in question, (*quas vulgus elegerit*), was to provide against the king's assuming to legislate without the assent of the people in parliament.

house. And, when the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of parliament[85].

This statute or act is placed among the records of the kingdom; there needing no formal promulgation to give it the force of a law, as was necessary by the civil law with regard to the emperor's edicts, because every man in England is, in judgment of law, party to making an act of parliament, being present thereat by his representatives. However, a copy thereof is usually printed at the king's press for the information of the whole land. And formerly, before the invention of printing, it was used to be published by the sheriff of every county; the king's writ being sent to him at the end of every session, together with a transcript of all the acts made at that session, commanding him, "*ut statuta illa, et omnes articulos in eisdem contentos, in singulis locis ubi expedire viderit, publicè proclamari, et firmiter teneri et observari faciat.*" And the usage was to proclaim them at his county court, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of Henry the Seventh[a 86].

[a] 3 Inst. 41; 4 Inst. 26.

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(85) And if no other day be specified, comes into operation from the day on which it receives the royal assent, (33 Geo. 3, c. 13). By 48 Geo. 3, c. 106, when a bill for continuing expiring acts shall not have passed before such acts expire, the bill, when passed into a law, shall have effect from the date of the expiration of the act intended to be continued. (See further, supra, p. 46, n. 6.)

(86) In 1801, both houses of parliament passed the following resolutions:

1. That it is expedient for the more speedy and general promulgation of the laws of the United Kingdom, that his Majesty's printer should be authorized and directed to print not less than 5500 copies of every public general statute, and 300 copies of every public, local, and personal statute.

2. That he be authorized to deliver or transmit, by post or otherwise, immediately after each bill has received the royal assent, the aforesaid number of 5500 copies of each general public statute, distributing them among all the chief magistrates and head officers of all cities, boroughs, and towns corporate in England and Ireland, and the royal burghs in Scotland, and the clerks of the peace and town clerks.

3. The like with respect to the 300 copies of each public, local, and personal statute.

4. That every person receiving the same, shall preserve them for the public use, and transmit them to his successor in office.

5. That for the purpose of effectuating the promulgation of private statutes, (if the parties interested therein shall think proper), and also for making compensation to the clerk of the parliament and officers of the House of

[186]

An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth[87]. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the king himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament: for it is a maxim in law, that it requires the same strength to dissolve as to create an obligation. It is true it was formerly held that the king might in many cases dispense with penal statutes[b]: but now by statute 1 Wm. & M. st. 2, c. 2, it is declared, that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal[88].

VII. Modes of adjourning, proroguing, and dissolving parliament.

VII. There remains only, in the seventh and last place, to add a word or two concerning the manner in which parliaments may be adjourned, prorogued, or dissolved.

An *adjournment* is no more than a continuance of the session from one day to another, as the word itself signifies: and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one house is no adjournment of the other[c]. It hath also been usual, when his majesty hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the king's pleasure so signified,

[b] Finch. L. 81, 234; Bacon. Elem. c. 19. [c] 4 Inst. 28.

Lords (in lieu of their annual average emoluments arising from the office copies of such statutes) without bringing any new charge upon the public, the parties interested in every such statute shall make good such expense and compensation; and that thereupon such printed copies of every such statute shall be made judicially admissible in evidence, by adding thereto a clause declaring the same to be a public act.

6. That his Majesty's printer shall also be authorized and directed to class the general statutes, and the public, local, and personal statutes of each session in separate volumes, and to number the chapters of each class separately, and also to print one general title to each volume, together with a general table of all the acts passed in that session.—And in accordance with these resolutions directions were given to the Queen's printer. —[CHITTY].

(87) Vide supra, pp. 43, 161.

(88) Vide supra, 142, n. 16.

and to adjourn accordingly[d]. Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow: which would often be very inconvenient to both public and private business. For prorogation puts an end to the session; and then such bills as are only begun and not perfected, must be resumed *de novo* (if at all) in a subsequent session; whereas, after an adjournment, all things continue in the same state
[187] as at the time of the adjournment made, and may be proceeded on without any fresh commencement.

A *prorogation* is the continuance of the parliament from one session to another, as an adjournment is the continuation of the session from day to day. This is done by the royal authority, expressed either by the lord chancellor in his majesty's presence, or by commission from the crown, or frequently by proclamation[89]. Both houses are necessarily prorogued at the same time; it not being a prorogation of the house of lords, or commons, but of the parliament. The session is never understood to be at an end until a prorogation; though, unless some act be passed or some judgment given in parliament, it is in truth no session at all[e]. And formerly the usage was, for the king to give the royal assent to all such bills as he approved, at the end of every session, and then to prorogue the parliament; though sometimes only for a day or two[f]; after which all business then depending in the houses was to be begun again. Which custom obtained so strongly, that it once became a question[g], whether

[d] Com. Journ. *passim*, *e. g.* 11 Jun. 1572; 5 Apr. 1604; 4 Jun., 14 Nov., 18 Dec. 1621; 11 Jul. 1625; 13 Sept. 1660; 25 Jul. 1667; 4 Aug. 1685; 24 Feb. 1691; 21 Jun. 1712; 16 Apr. 1717; 3 Feb. 1741; 10 Dec. 1745; 21 May, 1768.

[e] 4 Inst. 28. Hale of Parl. 38. Hut. 61.

[f] Com. Journ. 21 Oct. 1553.

[g] Ibid. 21 Nov. 1554.

(89) When it is intended that parliament about to assemble shall meet for the dispatch of business on the day to which it is prorogued, notice of such intention is given by proclamation. But when it is intended that a parliament shall not meet for the dispatch of business, it is prorogued to another day by a writ of prorogation. Nevertheless, upon the day on which the writs of summons are returnable, the members of the House of Commons who attend assemble, (without entering their own house, or waiting for a message), in the House of Lords, when the lord chancellor reads the writ of prorogation, and declares parliament to be prorogued accordingly. Com. Dig. Parl. p. 2; Com. Journ. 26 Nov. 1790; Ibid. 3 Nov. 1761; 2 Hats. 239.

giving the royal assent to a single bill did not of course put an end to the session. And, though it was then resolved in the negative, yet the notion was so deeply rooted, that the statute 1 Car. I. c. 7, was passed to declare, that the king's assent to that and some other acts should not put an end to the session; and, even so late as the reign of Charles II., we find a proviso frequently tacked to a bill [h], that his majesty's assent thereto should not determine the session of parliament. But it now seems to be allowed, that a prorogation must be expressly made, in order to determine the session. And, if at the time of an actual rebellion, or imminent danger of invasion, the parliament shall be separated by adjournment or prorogation, the king is empowered [i] to call them together by proclamation, within fourteen days' notice of the time appointed for their re-assembling [90].

A *dissolution* is the civil death of the parliament; and this [188] may be effected three ways: 1. By the king's will, expressed either in person or by representation. For, as the king has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to its existence. If nothing had a right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power: as was fatally experienced by the unfortunate king Charles the First; who, having unadvisedly passed an act to continue the parliament then in being till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power, which he himself had consented to give

[h] Stat. 12 Car. II. c. 1; 22 & 23 Car. II. c. 1.
[i] Stat. 30 Geo. II. c. 25.

(90) But now by 37 Geo. 3, c. 127, and 39 & 40 Geo. 3, c. 14, her Majesty can always summon an adjourned or prorogued parliament to meet for the dispatch of business on any day not less than fourteen days from the date of the proclamation, notwithstanding any previous adjournment or prorogation to a longer day; and all orders appointed for the day of adjournment or prorogation, or for any day subsequent thereto, except such as shall be specially appointed for particular days, shall be deemed to be appointed for the day on which the parliament shall meet in pursuance of such proclamation.

them. It is therefore extremely necessary that the crown should be empowered to regulate the duration of these assemblies, under the limitations which the English constitution has prescribed: so that, on the one hand, they may frequently and regularly come together for the dispatch of business, and redress of grievances; and may not, on the other, even with the consent of the crown, be continued to an inconvenient or unconstitutional length.

2. A parliament may be *dissolved* by the demise of the crown. This dissolution formerly happened immediately upon the death of the reigning sovereign: for he being considered in law as the head of the parliament (*caput, principium, et finis*), that failing, the whole body was held to be extinct. But calling a new parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being in case of a disputed succession, it was enacted by the statutes 7 & 8 Wm. III. c. 15, and 6 Ann. c. 7, that the parliament in being shall continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor: that if the parliament be, at the time of the king's death, separated by adjournment or pro-
[189] rogation, it shall notwithstanding assemble immediately: and that, if no parliament is then in being, the members of the last parliament shall assemble, and be again a parliament[91].

3. Lastly, a parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual; or might last for the life of the prince who convened them, as formerly; and were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past all remedy:

(91) This last clause was repealed by 37 Geo. 3, c. 127, which enacted in its place that in case of the demise of the crown between the dissolution of parliament and the day appointed by the writs of summons previously issued, for assembling a new parliament, then the last preceding parliament shall immediately convene and sit and continue for six months unless sooner prorogued or dissolved by the successor; and that in case of the demise of the crown on or after the day appointed as aforesaid for the assembling a new parliament, but before it has actually met and sat, then such new parliament shall immediately convene and sit and may continue sitting for six months unless sooner prorogued or dissolved by the successor.

but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly also, which is sure to be separated again (whereby its members will themselves become private men, and subject to the full extent of the laws which they have enacted for others), will think themselves bound, in interest as well as duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit[92] by statute 6 W. & M. c. 2, was *three* years; after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But by the statute of 1 Geo. I. st. 2, c. 38, (in order, professedly, to prevent the great and continued expenses of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion) this term was prolonged to *seven* years: and, what alone is an instance of the vast authority of parliament, the very same house, that was chosen for three years, enacted its own continuance for seven. So that, as our constitution now stands, the parliament must expire, or

(92) By the Triennial Act of the long parliament (16 Car. 1, c. 1), it was enacted, that every parliament was to be *ipso facto* dissolved at the expiration of three years from the first day of its session, unless actually sitting at the time, and, in that case, at its first adjournment or prorogation. The chancellor or keeper of the great seal was to be sworn to issue writs for a new parliament within three years from the dissolution of the last, under pain of disability to hold his office and further punishment; in case of his failure to comply with this provision, the peers were to issue writs to the sheriffs;—if the peers did not fulfil this duty, the sheriffs were to cause elections to be duly made—and, in their default, the electors were to proceed to choose their representatives. The 16 Car. 2, c. 1, repeals every clause and article of this enactment in the fullest manner; yet, with an inconsistency not unusual in our statutes, adds a provision that parliaments shall not in future be intermitted for above three years at the most. The effect of this statute, therefore, was, that the law of the long parliament subsisted as to its principle, without those unusual clauses which were intended to render its observance secure. But the necessity for these or some equivalent securities for the frequent sitting of parliament, and for its purification by frequent elections, became manifest before the close of the reign of Car. 2; one parliament alone having continued for seventeen years, and nearly four years having elapsed between the dissolution of the last parliament and the death of the king.

die a natural death, at the end of every seventh year [93]; if not sooner dissolved by the royal prerogative.

(93) Whatever may be the most expedient term for the duration of parliaments, it is now fully established that nothing but some great change of national policy justifies its abridgment by the ministry. The crown would obtain a very serious advantage over the House of Commons, if it should become an ordinary thing to dissolve parliament for some petty ministerial interest, or to avert some unpalatable resolution. Custom appears to have established the substitution of six instead of seven years for the duration of parliament. (See Hallam's Con. Hist. vol. iii. p. 318).

CHAPTER III.

OF THE KING AND HIS TITLE.

THE supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen; for it matters not to which sex the crown descends: but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power; as is declared by statute 1 Mar. st. 3, c. 1. [190]

In discoursing of the royal rights and authority, I shall consider the king under six distinct views: 1. With regard to his title. 2. His royal family. 3. His councils. 4. His duties. 5. His prerogative. 6. His revenue. And first, with regard to his title. The king's rights and authority to be considered under six heads.

The executive power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general consent is long and immemorial usage, it became necessary to the freedom and peace of the state, that a rule should be laid down, uniform, universal, and permanent; in order to mark out with precision, *who* is that single person, to whom are committed (in subservience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due. It is of the highest importance to the public tranquillity, and to the consciences of private men, that this rule should be clear and indisputable; and our constitution has not left us in the dark upon this material occasion. It will therefore be the endeavour of this chapter to trace out the constitutional doctrine of the royal succession, with that freedom and regard to truth, yet mixed with that reverence and respect, which the principles of liberty and the dignity of the subject require. 1. His title. [191]

The grand fundamental maxim upon which the *jus coronæ*, or right of succession to the throne of these kingdoms, depends, I take to be this: "that the crown is, by common law and constitutional custom, hereditary; and this in a manner peculiar to itself: but that the right of inheritance may from time to time be changed or limited by act of parliament; under which limitations the crown still continues hereditary." And this proposition it will be the business of this chapter to prove, in all its branches; first, that the crown is hereditary; secondly, that it is hereditary in a manner peculiar to itself; thirdly, that this inheritance is subject to limitation by parliament; lastly, that when it is so limited, it is hereditary in the new proprietor.

The crown hereditary;

1. First, it is in general *hereditary*, or descendible to the next heir, on the death or demise of the last proprietor. All regal governments must be either hereditary or elective: and, as I believe there is no instance wherein the crown of England has ever been asserted to be elective, except by the regicides at the infamous and unparalleled trial of king Charles I., it must of consequence be hereditary. Yet while I assert an hereditary, I by no means intend a *jure divino* title to the throne. Such a title may be allowed to have subsisted under the theocratic establishments of the children of Israel in Palestine; but it never yet subsisted in any other country; save only so far as kingdoms, like other human fabrics, are subject to the general and ordinary dispensations of Providence. Nor indeed have a *jure divino* and an *hereditary* right any necessary connexion with each other; as some have very weakly imagined. [192] The titles of David and Jehu were equally *jure divino*, as those of either Solomon or Ahab; and yet David slew the sons of his predecessor, and Jehu his predecessor himself. And when our kings have the same warrant as they had, whether it be to sit upon the throne of their fathers, or to destroy the house of the preceding sovereign, they will then, and not before, possess the crown of England by a right like theirs, *immediately* derived from heaven. The hereditary right which the laws of England acknowledge, owes its origin to the founders of our constitution, and to them only. It has no relation to, nor depends upon, the civil laws of the Jews, the Greeks, the Romans, or any other nation upon earth: the municipal laws of one society having no connexion with, or

but not jure divino.

influence upon, the fundamental polity of another. The founders of our English monarchy might perhaps, if they had thought proper, have made it an elective monarchy: but they rather chose, and upon good reason, to establish originally a succession by inheritance. This has been acquiesced in by general consent; and ripened by degrees into common law: the very same title that every private man has to his own estate. Lands are not naturally descendible any more than thrones: but the law has thought proper, for the benefit and peace of the public, to establish hereditary succession in the one as well as the other.

It must be owned, an elective monarchy seems to be the most obvious, and best suited of any to the rational principles of government, and the freedom of human nature: and accordingly we find from history that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince, hath usually been elective. And, if the individuals who compose that state could always continue true to first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, elective succession were as much to be desired in a kingdom, as in other inferior communities. The best, the wisest, and the bravest man would then be sure of receiving that crown, which his endowments have merited; and the sense of an unbiassed majority would be dutifully acquiesced in by the few who were of different opinions. But history and observation will inform us, that [193] elections of every kind (in the present state of human nature) are too frequently brought about by influence, partiality, and artifice: and, even where the case is otherwise, these practices will be often suspected, and as constantly charged upon the successful, by a splenetic disappointed minority. This is an evil to which all societies are liable; as well those of a private and domestic kind, as the great community of the public, which regulates and includes the rest. But in the former there is this advantage; that such suspicions, if false, proceed no farther than jealousies and murmurs, which time will effectually suppress; and, if true, the injustice may be remedied by legal means, by an appeal to those tribunals to which every member of society has (by becoming such) virtually engaged to submit. Whereas in the great and independent society, which every nation composes, there is no superior to

resort to but the law of nature; no method to redress the infringements of that law but the actual exertion of private force. As therefore between two nations, complaining of mutual injuries, the quarrel can only be decided by the law of arms; so in one and the same nation, when the fundamental principles of their common union are supposed to be invaded, and more especially when the appointment of their chief magistrate is alleged to be unduly made, the only tribunal to which the complainants can appeal, is that of the God of battles; the only process by which the appeal can be carried on is that of a civil and intestine war. An hereditary succession to the crown is therefore now established, in this and most other countries, in order to prevent that periodical blood-shed and misery, which the history of ancient imperial Rome and the more modern experience of Poland and Germany, may shew us are the consequences of elective kingdoms.

2. The mode of succession nearly the same as of landed estates.

2. But, secondly, as to the particular mode of inheritance, it in general corresponds with the feodal path of descents, chalked out by the common law in succession to landed estates; yet with one or two material exceptions. Like estates, the crown will descend lineally to the issue of the reigning monarch; as it did from king John to Richard II., through a regular pedigree of six lineal generations. As in common descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. Thus Edward V. succeeded to the crown in preference to Richard his younger brother, and Elizabeth his elder sister. Like lands or tenements, the crown, on failure of the male line, descends to the issue female; according to the ancient British custom remarked by Tacitus[a]: "*solent fœminarum ductu bellare, et sexum in imperiis non discernere.*" Thus Mary I., succeeded to Edward VI., and the line of Margaret queen of Scots, the daughter of Henry VII., succeeded on failure of the line of Henry VIII. his son. But among the females, the crown descends by right of primogeniture to the eldest daughter only and her issue; and not, as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect; and therefore queen Mary, on the death of her brother, suc-

[194]

[a] *In vitâ Agricolæ.*

ceeded to the crown alone, and not in partnership with her sister Elizabeth. Again; the doctrine of representation prevails in the descent of the crown, as it does in other inheritances; whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done. Thus Richard II. succeeded his grandfather Edward III., in right of his father the black prince; to the exclusion of all his uncles, his grandfather's younger children. Lastly, on failure of lineal descendants, the crown goes to the next collateral relations of the late king; provided they are lineally descended from the blood-royal, that is, from that royal stock which originally acquired the crown. Thus Henry I. succeeded to William II., John to Richard I., and James I. to Elizabeth; being all derived from the Conqueror, who was then the only regal stock. But herein there is no objection (as in the case of common descents[1]) to the succession of a brother, an uncle, or other collateral relation, of the *half* blood; that is, where the relationship proceeds not from the same *couple* of ancestors (which constitutes a kinsman of the [195] *whole* blood) but from a *single* ancestor only; as when two persons are derived from the same father, and not from the same mother, or *vice versa:* provided only, that the one ancestor, from whom both are descended, be that from whose veins the blood-royal is communicated to each. Thus Mary I. inherited to Edward VI., and Elizabeth inherited[2] to Mary; all children of the same father, king Henry VIII., but all by different mothers. The reason of which diversity, between royal and common descents, will be better understood hereafter, when we examine the nature of inheritances in general.

3. The doctrine of *hereditary* right does by no means imply an *indefeasible* right to the throne. No man will, I think, assert this, that has considered our laws, constitution, and history, without prejudice, and with any degree of attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom, the king and both houses of parliament, to defeat this hereditary right; and, by particular entails, limitations and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly

3. The title defeasible by act of parliament.

(1) Previously to the statute 3 & 4 Wm. 4, c. 106, s. 5.

(2) Nevertheless each of these queens thought it advisable to confirm her hereditary title by an act of parliament, (Vide infra, p. 207).

consonant to our laws and constitution; as may be gathered from the expression so frequently used in our statute book, of the "king's majesty, his heirs, and successors." In which we may observe, that as the word "heirs" necessarily implies an inheritance or hereditary right, generally subsisting in the royal person; so the word "successors" distinctly taken, must imply that this inheritance may sometimes be broken through; or, that there may be a successor, without being the heir, of the king. And this is so extremely reasonable, that without such a power, lodged somewhere, our polity would be very defective. For, let us barely suppose so melancholy a case, as that the heir apparent should be a lunatic, an idiot, or otherwise incapable of reigning; how miserable would the condition of the nation be, if he were also incapable of being set aside!—It is therefore necessary that this power should be lodged somewhere: and yet the inheritance and regal dignity would be very precarious indeed, if this power were *expressly* and *avowedly* lodged in the hands of the subject only, to be exerted whenever prejudice, caprice, [196] or discontent should happen to take the lead. Consequently it can no where be so properly lodged as in the two houses of parliament, by and with the consent of the reigning king; who, it is not to be supposed, will agree to any thing improperly prejudicial to the rights of his own descendants. And therefore in the king, lords, and commons, in parliament assembled, our laws have expressly lodged it.

4. The crown always hereditary in the wearer of it.

4. But, fourthly; however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it. And hence in our law the king is said never to die, in his political capacity; though, in common with other men, he is subject to mortality in his natural: because immediately upon the natural death of Henry, William, or Edward, the king survives in his successor. For the right of the crown vests, *eo instanti*, upon his heir; either the *hæres natus*, if the course of descent remains unimpeached, or the *hæres factus*, if the inheritance be under any particular settlement. So that there can be no *interregnum*[3]; but, as

(3) Upon this principle it is that the dates of the statutes and other legal proceedings of this reign are reckoned from the year 1641; when, upon the execution of Charles 1, the title to the crown descended to Charles 2, and not from 1660 the date of the Restoration.

sir Matthew Hale[b] observes, the right of sovereignty is fully invested in the successor by the very descent of the crown. And therefore, however acquired, it becomes in him absolutely hereditary, unless by the rules of the limitation it is otherwise ordered and determined. In the same manner as landed estates, to continue our former comparison, are by the law hereditary, or descendible to the heirs of the owner; but still there exists a power, by which the property of those lands may be transferred to another person. If this transfer be made simply and absolutely, the lands will be hereditary in the new owner, and descend to his heir at law; but if the transfer be clogged with any limitations, conditions, or entails, the lands must descend in that channel, so limited and prescribed, and no other.

Concise history of the succession to the crown.

In these four points consists, as I take it, the constitutional notion of hereditary right to the throne; which will be still farther elucidated, and made clear beyond all dispute, from a short historical view of the successions to the crown of [197] England, the doctrines of our ancient lawyers, and the several acts of parliament that have from time to time been made, to create, to declare, to confirm, to limit, or to bar the hereditary title to the throne. And in the pursuit of this inquiry we shall find, that from the days of Egbert, the first sole monarch of this kingdom, even to the present, the four cardinal maxims above mentioned have ever been held constitutional canons of succession. It is true, the succession, through fraud, or force, or sometimes through necessity, when in hostile times the crown descended on a minor or the like, has been very frequently suspended; but has generally at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened. And, even in those instances where the succession has been violated, the crown has ever been looked upon as hereditary in the wearer of it. Of which the usurpers themselves were so sensible, that they for the most part endeavoured to vamp up some feeble show of a title by descent, in order to amuse the people while they gained possession of the kingdom. And, when possession was once gained, they considered it as the purchase or acquisition of a new estate of inheritance, and transmitted it or endeavoured

[b] 1 Hist. P. C. 61.

to transmit it to their own posterity, by a kind of hereditary right of usurpation.

Egbert. King Egbert, about the year 800, found himself in possession of the throne of the west Saxons, by a long and undisturbed descent from his ancestors of above three hundred years. How his ancestors acquired their title, whether by force, by fraud, by contract, or by election, it matters not much to inquire; and is indeed a point of such high antiquity, as must render all inquiries at best but plausible guesses. His right must be supposed indisputably good, because we know no better. The other kingdoms of the heptarchy he acquired, some by consent, but most by a voluntary submission. And it is an established maxim in civil polity, and the law of nations, that when one country is united to another in such a manner, as that one keeps its government and states and the other loses them; the latter entirely assimilates with or is
[198] melted down in the former, and must adopt its laws and customs[c]. And in pursuance of this maxim there hath ever been, since the union of the heptarchy[4] in king Egbert, a general acquiescence under the hereditary monarchy of the west Saxons, through all the united kingdoms.

Edmund Ironside. From Egbert to the death of Edmund Ironside, a period of above two hundred years, the crown descended regularly through a succession of fifteen princes, without any deviation or interruption: save only that the sons of king Ethelwolf succeeded to each other in the kingdom, without regard to the children of the elder branches, according to the rule of succession prescribed by their father, and confirmed by the wittena-gemote, in the heat of the Danish invasions: and also that king Edred, the uncle of Edwy, mounted the throne for about nine years, in the right of his nephew a minor, the times being very troublesome and dangerous. But this was with a view to preserve, and not to destroy, the succession; and accordingly Edwy succeeded him.

King Edmund Ironside was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute king

[c] Puff. L. of N. and N, b. 8, c. 12, § 6.

(4) See in Turner's History of the Anglo-Saxons, b. iii. c. 11, an examination of the extent to which we really are indebted to Egbert for the consolidation of England under one monarchy.

of Denmark; and Canute, after his death, seized the whole of it, Edmund's son being driven into foreign countries. Here the succession was suspended by actual force, and a new family introduced upon the throne: in whom however this new-acquired throne continued hereditary for three reigns; when, upon the death of Hardiknute, the ancient Saxon line was restored in the person of Edward the Confessor.

Edward the Confessor.

He was not indeed the true heir to the crown, being the younger brother of king Edmund Ironside, who had a son Edward, sirnamed (from his exile) the outlaw, still living. But this son was then in Hungary; and, the English having just shaken off the Danish yoke, it was necessary that somebody on the spot should mount the throne; and the Confessor was the next of the royal line then in England. On his decease without issue, Harold II. usurped the throne; and almost at the same instant came on the Norman invasion: the right to the crown being all the time in Edgar, sirnamed Atheling (which signifies in the Saxon language *illustrious*, or of royal blood), who was the son of Edward the outlaw, and grandson of Edmund Ironside; or, as Matthew Paris[d] well expresses the sense of our old constitution, "*Edmundus autem latusferreum, rex naturalis de stirpe regum, genuit Edwardum: et Edwardus genuit Edgarum, cui de jure debebatur regnum Anglorum.*"

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William the Conqueror.

William the Norman claimed the crown by virtue of a pretended grant from King Edward the Confessor; a grant which, if real, was in itself utterly invalid; because it was made, as Harold well observed in his reply to William's demand[e], "*absque generali senatus et populi conventu et edicto;*" which also very plainly implies, that it then was generally understood that the king, with consent of the general council, might dispose of the crown, and change the line of succession. William's title however was altogether as good as Harold's, he being a mere private subject, and an utter stranger to the royal blood. Edgar Atheling's undoubted right was overwhelmed by the violence of the times; though frequently asserted by the English nobility after the Conquest, till such time as he died without issue: but all their attempts proved unsuccessful, and only served

[d] A.D. 1066.

[e] William of Malmsb. l. 3.

the more firmly to establish the crown in the family which had newly acquired it.

This conquest then by William of Normandy was, like that of Canute before, a forcible transfer of the crown of England into a new family; but, the crown being so transferred, all the inherent properties of the crown were with it transferred also. For, the victory obtained at Hastings not being[f] a victory over the nation collectively, but only over the person of Harold, the only right that the Conqueror could pretend to acquire thereby, was the right to possess the crown of England, not to alter the nature of the government. And therefore as the English laws still remained in [200] force, he must necessarily take the crown subject to those laws, and with all its inherent properties; the first and principal of which was its descendibility. Here then we must drop our race of Saxon kings, at least for a while, and derive our descents from William the Conqueror as from a new stock, who acquired by right of war (such as it is, yet still the *dernier resort* of kings) a strong and undisputed title to the inheritable crown of England.

William II. Accordingly it descended from him to his sons William II. and Henry I. Robert, it must be owned, his eldest son, was kept out of possession by the arts and violence of his brethren: who perhaps might proceed upon a notion, which prevailed for some time in the law of descents (though never adopted as the rule of public successions[g]), that when the eldest son was already provided for (as Robert was constituted Henry I. duke of Normandy by his father's will), in such a case the next brother was entitled to enjoy the rest of their father's inheritance. But, as he died without issue, Henry at last had a good title to the throne, whatever he might have at first.

Stephen. Stephen of Blois, who succeeded him, was indeed the grandson of the Conqueror, by Adelicia his daughter, and claimed the throne by a feeble kind of hereditary right: not as being the nearest of the male line, but as the nearest male of the blood royal, excepting his elder brother Theobald; who was earl of Blois, and therefore seems to have waived, as he certainly never insisted on, so troublesome and precarious

[f] Hale, Hist. C. L. c. 5; Seld. review of tithes, c. 8.

[g] See Lord Lyttleton's Life of Hen. II. vol. 1, p. 467.

a claim. The real right was in the empress Matilda or Maud, the daughter of Henry I.; the rule of succession being (where women are admitted at all) that the daughter of a son shall be preferred to the son of a daughter. So that Stephen was little better than a mere usurper; and therefore he rather chose to rely on a title by election[h], while the empress Maud did not fail to assert her hereditary right by the [201] sword; which dispute was attended with various success, and ended at last in the compromise made at Wallingford, that Stephen should keep the crown, but that Henry the son of Maud should succeed him; as he afterwards accordingly did.

Henry, the second of that name, was (next after his mother Matilda) the undoubted heir of William the Conqueror; but he had also another connexion in blood, which endeared him still farther to the English. He was lineally descended from Edmund Ironside, the last of the Saxon race of hereditary kings. For Edward the outlaw, the son of Edmund Ironside, had (besides Edgar Atheling, who died without issue) a daughter Margaret, who was married to Malcolm king of Scotland; and in her the Saxon hereditary right resided. By Malcolm she had several children, and among the rest Matilda the wife of Henry I., who by him had the empress Maud, the mother of Henry II. Upon which account the Saxon line is in our histories frequently said to have been restored in his person: though in reality that right subsisted in the *sons* of Malcolm by queen Margaret; king Henry's best title being as heir to the Conqueror. Henry II.

From Henry II. the crown descended to his eldest son Richard I., who dying childless, the right vested in his nephew Arthur, the son of Geoffrey his next brother: but John, the youngest son of king Henry, seized the throne; claiming, as appears from his charters, the crown by hereditary right[i]: that is to say, he was next of kin to the deceased king, being his surviving brother: whereas Arthur was removed one degree farther, being his brother's son, though by right of representation he stood in the place of his father Geoffrey. And however flimsy this title, and those of Richard I. John.

[h] "*Ego Stephanus Dei gratia assensu cleri et populi in regem Anglorum electus, &c.*" (Cart. A.D. 1136. Ric. de Hagustald. 314; Hearne ad Guil. Neubr. 711).

[i] "— *Regni Angliæ; quod nobis jure competit hæreditario.*" Spelm. Hist. R. Joh. apud Wilkins, 354.

William Rufus and Stephen of Blois, may appear at this distance to us, after the law of descents hath now been settled for so many centuries, they were sufficient to puzzle the understandings of our brave, but unlettered ancestors. Nor indeed can we wonder at the number of partizans, who espoused the pretensions of king John in particular; since, even in the reign of his father king Henry II., it was a point undetermined[j]; whether, even in common inheritances, the child of an elder brother should succeed to the land in right of representation, or the younger surviving brother in right of proximity of blood. Nor is it to this day decided in the collateral succession to the fiefs of the empire, whether the order of the stocks, or the proximity of degree, shall take place[k]. However, on the death of Arthur and his sister Eleanor without issue, a clear and indisputable title vested in Henry III. the son of John: and from him to Richard the Second, a succession of six generations, the crown descended in the true hereditary line. Under one of which race of princes[l] we find it declared in parliament, "that the law of the crown of England is, and always hath been, that the children of the king of England, whether born in England or elsewhere, ought to bear the inheritance after the death of their ancestors. Which law our sovereign lord the king, the prelates, earls, and barons, and other great men, together with all the commons in parliament assembled, do approve and affirm for ever."

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Henry III.

Richard II.

Upon Richard the Second's resignation of the crown, he having no children, the right resulted to the issue of his grandfather Edward III. That king had many children, besides his eldest, Edward the black prince of Wales, the father of Richard II.: but to avoid confusion I shall only mention three; William his second son, who died without issue; Lionel, duke of Clarence, his third son; and John of Gant, duke of Lancaster, his fourth. By the rules of succession therefore the posterity of Lionel duke of Clarence were entitled to the throne upon the resignation of king Richard; and had accordingly been declared by the king, many years before, the presumptive heirs of the crown: which declaration was also confirmed in parliament[m]. But Henry duke of

[j] Glanv. l. 7, c. 3.
[k] Mod. Un. Hist. xxx. 512.
[l] Stat. 25 Edw. III. st. 2.
[m] Sandford's Gen. Hist. 246.

Lancaster, the son of John of Gant, having then a large army in the kingdom, the pretence of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, it was impossible for any other title to be asserted with any safety; and he became king under the title of Henry IV. Henry IV. But, as sir Matthew Hale remarks [n], though the people unjustly assisted Henry IV. in his usurpation of the crown, yet he was not admitted thereto, until he had declared that he claimed, not as a conqueror (which he very much inclined to do [o]), but as a successor, descended by right line of the blood royal; as appears from the rolls of parliament in those times [5]. And in order to this he set up a show of two [203]

[n] Hist. C. L. c. 5.

[o] Seld. tit. Hon. 1, 3.

(5) Every step in the revolution which elevated Hen. 4 to the throne was planned and executed with great care and technical formality; and the whole proceeding may well be considered the precedent of the revolution of 1688. The proceedings, as stated in the Parliament Roll (vol. 3), are as follows:—In the first place, Rich. 2, "after absolving all his subjects from their allegiance and renouncing the name of king, and the honour, regality, and celsitude royal, purely, voluntarily, simply, and absolutely, by the best way and form that the same could be done, did confess, acknowledge, repute, and truly and out of certain knowledge judge himself to have been and to be utterly insufficient and unuseful for the rule and government of the said kingdoms and dominions, and declared that for his notorious demerits he deserved to be deposed." We then find this abdication, cession, or renunciation of the crown "unanimously admitted by the lords spiritual and temporal, and the commons of the kingdom assembled in a great multitude in parliament," or rather in convention, "the chair of state being then empty, without any person whatsoever presiding therein." In the next place, we find the convention acting judicially and "for removing all scruples and taking away sinister suspicions, charging the king with very many crimes and defects very often committed by him, and with the general ill-governance of his kingdom, by reason of which they adjudged him unworthy to reign." The record contains no fewer than fifty articles of impeachment, setting forth elaborately the late violent and unconstitutional proceedings, and all the "frauds and deceitful tricks of the said king." After these articles and objections, the record proceeds thus, "And because it seemed to all the estates of the realm, that these causes of crimes and defaults were sufficient and notorious to depose the said king; considering also his own confession of his insufficiency and other things contained in his said renunciation and cession openly delivered; all the said states did unanimously consent that *ex abundante* they should proceed unto a deposition of the said king for the greater security and tranquillity of the people and benefit of the kingdom." Whereupon a commission consisting of two bishops, two peers, two knights, and one justice, was regularly appointed by the unanimous consent of the said estates and commons "to depose the said king from all kingly dignity, majesty, and honour, on the behalf and in the name and by the authority of all the said states, as in

titles: the one upon the pretence of being the first of the blood royal in the entire male line, whereas the duke of Clarence left only one daughter, Philippa; from which female branch, by a marriage with Edmond Mortimer earl of March, the house of York descended; the other, by reviving an exploded rumour, first propagated by John of Gant, that Edmond earl of Lancaster (to whom Henry's mother was heiress) was in reality the elder brother of king Edward I.; though his parents, on account of his personal deformity, had imposed him on the world for the younger; and therefore Henry would be entitled to the crown, either as successor to Richard II., in case the entire male line was allowed a preference to the female, or, even prior to that unfortunate prince, if the crown could descend through a female, while an entire male line was existing.

Henry IV.

However, as in Edward the Third's time we find the parliament approving and affirming the law of the crown, as before stated, so in the reign of Henry IV. they actually exerted their right of new-settling the succession to the crown. And this was done by the statute 7 Hen. IV. c. 2, whereby it is enacted, "that the inheritance of the crown and realms of England and France, and all other the king's

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like cases from the ancient custom of the said kingdom had been observed." And forthwith the said commissioners, sitting on a tribunal before the royal chair of state, did "on the behalf, and in the name, and by the authority aforesaid, pass sentence of deposition upon the king, forbidding all and singular the lords, archbishops, bishops, and prelates, dukes, marquisses, earls, barons, knights, vassals, and valvasors, and other subjects and liege people, and that thenceforth none of them should any way obey or regard the said Richard as king or lord of the said kingdom and dominion." Commissioners were then appointed to resign fealty to king Richard. And then presently, "as soon as it appeared that the crown of England was vacant, Henry rising up from his place and humbly fortifying himself with the sign of the cross on his forehead and on his breast, having also first called upon the name of Christ, did claim the said kingdom so vacant as aforesaid, with its crown and all its members and appurtenances." After which claim and challenge, "the lords spiritual and temporal and all the states there present with the whole people did unanimously consent that the said duke should reign over them." And in conclusion, the new king shewed to the states of the kingdom the signet of the late king, "delivered to him as a token of his will that he should succeed him as aforesaid." It was not until after these long and formal proceedings, (in which the lawyers seem to have borne a considerable part, vide Hallam. Mid. Ag. iii. 124), that the title of the new king was considered complete, and his coronation took place; after which the commons chose their speaker and the business of parliament proceeded in ordinary course.

dominions, shall be *set and remain* [p] in the presence of our sovereign lord the king, and in the heirs of his body issuing;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body issuing, with remainder [204] to lord Thomas, lord John, and lord Humphry, the king's sons, and the heirs of their bodies respectively: which is indeed nothing more than the law would have done before, provided Henry the Fourth had been a rightful king. It however serves to shew that it was then generally understood, that the king and parliament had a right to new-model and regulate the succession to the crown: and we may also observe, with what caution and delicacy the parliament then avoided declaring any sentiment of Henry's original title. However, sir Edward Coke more than once expressly declares [q], that at the time of passing this act the right of the crown was in the descent from Philippa, daughter and heir of Lionel duke of Clarence.

Nevertheless the crown descended regularly from Henry IV. to his son and grandson Henry V. and VI.; in the latter of whose reigns the house of York asserted their dormant title; and, after embruing the kingdom in blood and confusion for seven years together, at last established it in the person of Edward IV. At his accession to the throne, after a breach of the succession that continued for three descents, and above threescore years, the distinction of a king *de jure* and a king *de facto* began to be first taken; in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom by confirming all honours conferred and all acts done, by those who were now called the usurpers, not tending to the disherison of the rightful heir. In statute 1 Edw. IV. c. 1, the three Henrys are styled, "late kings of England successively in dede, and not of ryght." And, in all the charters which I have met with of king Edward, wherever he has occasion to speak of any of the line of Lancaster, he calls them "*nuper de facto, et non de jure, reges Angliæ.*"

Henry V. Henry VI. Edward IV.

Edward IV. left two sons and a daughter; the eldest of which sons, king Edward V., enjoyed the regal dignity for a very short time, and was then deposed by Richard his unnatural uncle, who immediately usurped the royal dignity;

Edward V.

[p] *Soit mye et demoerge.* [q] 4 Inst. 37, 205.

having previously insinuated to the populace a suspicion of bastardy in the children of Edward IV., to make a show of
[205] some hereditary title: after which he is generally believed to have murdered his two nephews, upon whose death the right of the crown devolved to their sister Elizabeth.

Richard III. The tyrannical reign of king Richard III. gave occasion to Henry earl of Richmond to assert his title to the crown. A title the most remote and unaccountable that was ever set up, and which nothing could have given success to, but the universal detestation of the then usurper Richard. For, besides that he claimed under a descent from John of Gant, whose title was now exploded, the claim (such as it was) was through John Earl of Somerset, a bastard son, begotten by John of Gant upon Catherine Swinford. It is true, that by an act of parliament, 20 Ric. II., this son was, with others, legitimated and made inheritable to all lands, offices, and dignities, as if he had been born in wedlock: but still with an express reservation of the crown, "*excepta dignitate regali*[r]."

Henry VII. Notwithstanding all this, immediately after the battle of Bosworth field, he assumed the regal dignity; the right of the crown then being, as sir Edward Coke expressly declares[s], in Elizabeth, eldest daughter of Edward IV.: and his possession was established by parliament, holden the first year of his reign. In the act for which purpose, the parliament seems to have copied the caution of their predecessors in the reign of Henry IV.; and therefore (as Lord Bacon, the historian of this reign, observes) carefully avoided any recognition of Henry VII.'s right, which indeed was none at all; and the king would not have it by way of new law or ordinance, whereby a right might seem to be created and conferred upon him; and therefore a middle way was rather chosen, by way (as the noble historian expresses it) of *establishment*, and that under covert and indifferent words, "that the inheritance of the crown should *rest*, *remain*, and *abide* in king Henry VII. and the heirs of his body:" thereby providing for the future, and at the same time acknowledging his present possession; but not determining either way,
[206] whether that possession was *de jure* or *de facto* merely. However, he soon after married Elizabeth of York, the

[r] 4 Inst. 36. [s] Ibid. 37.

undoubted heiress of the Conqueror, and thereby gained (as sir Edward Coke declares[s]) by much his best title to the crown. Whereupon the act made in his favour was so much disregarded, that it never was printed in our statute books.

Henry the Eighth, the issue of this marriage, succeeded to the crown by clear indisputable hereditary right, and transmitted it to his three children in successive order. But in his reign we, at several times, find the parliament busy in regulating the succession to the kingdom. And, first, by statute 25 Henry VIII. c. 12, which recites the mischiefs which have and may ensue by disputed titles, because no perfect and substantial provision hath been made by law concerning the succession; and then enacts, that the crown shall be entailed to his majesty, and the sons or heirs male of his body; and in default of such sons to the Lady Elizabeth (who is declared to be the king's eldest issue female, in exclusion of the lady Mary, on account of her supposed illegitimacy by the divorce of her mother queen Catherine) and to the lady Elizabeth's heirs of her body; and so on from issue female to issue female, and the heirs of their bodies, by course of inheritance according to their ages, *as the crown of England hath been accustomed and ought to go*, in case where there be heirs female of the same: and in default of issue female, then to the king's right heirs for ever. This single statute is an ample proof of all the four positions we at first set out with. Henry VIII.

But upon the king's divorce from Ann Boleyn, this statute was, with regard to the settlement of the crown, repealed by statute 28 Hen. VIII. c. 7, wherein the Lady Elizabeth is also, as well as the lady Mary, bastardized, and the crown settled on the king's children by queen Jane Seymour, and his future wives; and, in defect of such children, then with this remarkable remainder, to such persons as the king by letters patent, or last will and testament, should limit and appoint the same. A vast power; but, notwithstanding, as it was regularly vested in him by the supreme legislative authority, it was therefore indisputably valid. But this power was never carried into execution; for by statute 35 Hen. VIII. c. 1, the king's two daughters are legitimated again, and the crown is limited to prince Edward by name, [207]

[s] 4 Inst. 37.

after that to the lady Mary, and then to the lady Elizabeth, and the heirs of their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of the law, with regard to the descent of the crown.

Mary. But lest there should remain any doubt in the minds of the people, through this jumble of acts for limiting the succession, by statute 1 Mar. st. 2, c. 1, queen Mary's hereditary right to the throne is acknowledged and recognized in these words: "the crown of these realms is most lawfully, justly, and rightly *descended* and come to the queen's highness that now is, being the very, true, and undoubted heir and inheritrix thereof." And again, upon the queen's marriage with Philip of Spain, in the statute which settles the preliminaries of that match [t], the hereditary right to the crown is thus asserted and declared: "as touching the right of the queen's inheritance in the realm and dominions of England, the children, whether male or female, shall succeed in them, according to the known laws, statutes, and customs of the same." Which determination of the parliament, that the succession *shall* continue in the usual course, seems tacitly to imply a power of new-modelling and altering it, in case the legislature had thought proper.

Elizabeth. On queen Elizabeth's accession, her right is recognized in still stronger terms than her sister's; the parliament acknowledging [u], "that the queen's highness is, and in very deed and of most mere right ought to be, by the laws of God, and the laws and statutes of this realm, our most lawful and
[208] rightful sovereign liege lady and queen: and that her highness is rightly, lineally, and lawfully descended and come of the blood royal of this realm of England; in and to whose princely person, and to the heirs of her body lawfully to be begotten, after her, the imperial crown and dignity of this realm doth belong." And in the same reign, by statute 13 Eliz. c. 1, we find the right of parliament to direct the succession of the crown asserted in the most explicit words. "If any person shall hold, affirm, or maintain that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; or that the queen's majesty, with and by the authority of parliament, is not able to make laws and statutes of sufficient force and validity, to limit and

[t] 1 Mar. st. 2, c. 2. [u] Stat. 1 Eliz. c. 3.

bind the crown of this realm, and the descent, limitation, inheritance, and government thereof;—such person, so holding, affirming, or maintaining, shall, during the life of the queen, be guilty of high treason; and after her decease shall be guilty of a misdemeanor, and forfeit his goods and chattels."

James I. On the death of queen Elizabeth, without issue, the line of Henry VIII. became extinct. It therefore became necessary to recur to the other issue of Henry VII. by Elizabeth of York his queen; whose eldest daughter Margaret having married James IV. king of Scotland, king James the sixth of Scotland, and of England the first, was the lineal descendant from that alliance. So that in his person, as clearly as in Henry VIII., centered all the claims of different competitors, from the Conquest downwards, he being indisputably the lineal heir of the Conqueror. And, what is still more remarkable, in his person also centered the right of the Saxon monarchs which had been suspended from the Conquest till his accession. For, as was formerly observed, Margaret, the sister of Edgar Atheling, the daughter of Edward the outlaw, and grand-daughter of king Edmund Ironside, was the person in whom the hereditary right of the Saxon kings, supposing it not abolished by the conquest, resided. She married Malcolm king of Scotland; and Henry II., by a descent from Matilda their daughter, is generally called the restorer of the Saxon [209] line. But it must be remembered, that Malcolm by his Saxon queen had sons as well as daughters: and that the royal family of Scotland from that time downwards were the offspring of Malcolm and Margaret. Of this royal family king James the First was the direct lineal heir, and therefore united in his person every possible claim by hereditary right to the English as well as Scottish throne, being the heir both of Egbert and William the Conqueror.

And it is no wonder that a prince of more learning than wisdom, who could deduce an hereditary title for more than eight hundred years, should easily be taught by the flatterers of the times, to believe there was something divine in this right, and that the finger of Providence was visible in its preservation. Whereas, though a wise institution, it was clearly a human institution; and the right inherent in him no natural, but a positive right. And in this and no other light was

it taken by the English parliament; who by statute 1 Jac. 1, c. 1, did "recognize and acknowledge, that immediately upon the dissolution and decease of Elizabeth late queen of England, the imperial crown thereof did by inherent birthright, and lawful and undoubted succession, descend and come to his most excellent majesty, as being lineally, justly, and lawfully, next and sole heir of the blood royal of this realm." Not a word here of any right immediately derived from heaven: which, if it existed any where, must be sought for among the *aborigines* of the island, the ancient Britons; among whose princes indeed some have gone to search it for him[w].

Charles I. But, wild and absurd as the doctrine of divine right most undoubtedly is, it is still more astonishing, that when so many human hereditary rights had centered in this king, his son [210] and heir king Charles the First should be told by those infamous judges who pronounced his unparalelled sentence, that he was an elective prince; elected by his people, and therefore accountable to them, in his own proper person, for his conduct. The confusion, instability, and madness, which followed the fatal catastrophe of that pious and unfortunate prince, will be a standing argument in favour of hereditary monarchy to all future ages, as they proved at last to the then deluded people: who, in order to recover that peace and happiness which for twenty years together they had lost, in a solemn parliamentary convention of the estates restored the right heir of the crown. And in the proclamation for that purpose, which was drawn up and attended by both houses[x], they declared, "that according to their duty and allegiance, they did heartily, joyfully, and unanimously acknowledge and proclaim, that immediately upon the decease of our late sove-

Charles II. reign lord king Charles, the imperial crown of these realms did by inherent birthright, and lawful and undoubted succession, descend and come to his most excellent majesty Charles the Second, as being lineally, justly, and lawfully, next heir of the blood royal of this realm: and thereunto they most humbly and faithfully did submit and oblige themselves, their heirs, and posterity for ever."

[w] *Elizabeth* of York, the mother of queen Margaret of Scotland, was heiress of the house of Mortimer. And Mr. Carte observes, that the house of Mortimer, in virtue of its descent from Gladys only sister to Lewellin ap Jorwerth the Great, had the true right to the principality of Wales. Hist. Eng. iii. 705.

[x] Com. Journ. 8 May, 1660.

Crown.

Thus I think it clearly appears, from the highest authority this nation is acquainted with, that the crown of England hath ever been an hereditary crown; though subject to limitations by parliament. The remainder of this chapter will consist principally of those instances, wherein the parliament has asserted or exercised this right of altering and limiting the succession; a right which, we have seen, was before exercised and asserted in the reigns of Henry IV., Henry VII., Henry VIII., queen Mary, and queen Elizabeth.

Instances in which parliament has altered the succession.

The first instance, in point of time, is the famous bill of exclusion[6], which raised such a ferment in the latter end of the reign of king Charles the Second. It is well known that the purport of this bill was to have set aside the king's brother and presumptive heir, the duke of York, from the succession, on the score of his being a papist; that it passed the house of commons, but was rejected by the lords; the king having also declared beforehand, that he never would be brought to consent to it. And from this transaction we may collect two things: 1. That the crown was universally acknowledged to be hereditary; and the inheritance indefeasible unless by parliament: else it had been needless to prefer such a bill. 2. That the parliament had a power to have defeated the inheritance: else such a bill had been ineffectual. The commons acknowledged the hereditary right then subsisting; and the lords did not dispute the power, but merely the propriety of an exclusion. However, as the bill took no effect, king James the Second succeeded to the throne of his ancestors: and might have enjoyed it during the remainder of his life, but for his own infatuated conduct, which (with other concurrent circumstances), brought on the Revolution in 1688.

[211]

James II.

Revolution of 1688.

The true ground and principle upon which that memorable event proceeded, was an entirely new case in politics, which had never before happened in our history; the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeazance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament; it was the act of the nation alone, upon a conviction that there was no king in being. For in a full assem-

(6) On this bill the student should attentively peruse Mr. Hallam's remarks. (Con. Hist. ii. 578).

bly of the lords and commons, met in a convention upon the supposition of this vacancy, both houses[y] came to this resolution: "that king James the Second, having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between king and people; and by the advice of jesuits and other wicked persons, having violated the fundamental laws; and having withdrawn himself out of this kingdom; has abdicated the government, and that the throne
[212] is thereby vacant[7]." Thus ended at once, by this sudden and unexpected vacancy of the throne, the old line of succession; which from the Conquest had lasted above six hundred years, and from the union of the heptarchy in king Egbert almost nine hundred. The facts themselves thus appealed to, the king's endeavour to subvert the constitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were evident and notorious; and the consequences drawn from these facts (namely, that they amounted to an abdication of the government; which abdication did not affect only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant) it belonged to our ancestors to determine. For whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself; there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors have solemnly determined, in a full parliamentary convention representing the whole society. The reasons upon which they decided may be found at large in the parliamentary proceed-

[y] Com. Journ. 7 Feb. 1688.

(7) The convention in Scotland drew the same conclusion, viz., the vacancy of the throne, from premises and in language much more bold and intelligible: "The estates of the kingdom of Scotland find and declare, that king James the Seventh being a professed papist, did assume the royal power, and acted as a king, without ever taking the oath required by law; and had, by the advice of evil and wicked counsellors, invaded the fundamental constitution of this kingdom and altered it from a legal and limited monarchy to an arbitrary despotic power, and had governed the same to the subversion of the Protestant religion and violation of the laws and liberties of the nation, inverting all the ends of government, whereby he had forefaulted the crown, and the throne became vacant." (Tyndal, 71; Fol. Cont. of Rapin).—[CHRISTIAN].

ings of the times; and may be matter of instructive amusement for us to contemplate, as a speculative point of history. But care must be taken not to carry this inquiry farther, than merely for instruction or amusement. The idea, that the consciences of posterity were concerned in the rectitude of their ancestors' decisions, gave birth to those dangerous political heresies, which so long distracted the state, but at length are happily extinguished. I therefore rather choose to consider this great political measure upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expediency: because that might imply a right of dissenting or revolting from it, in case we should think it to have been unjust, oppressive, or inexpedient. Whereas, our ancestors having most indisputably a competent jurisdiction to decide this great and important question, and having in fact decided it, it is now become our duty at this distance of time to acquiesce in their determination, being born under that establishment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it[8]. [213]

But, while we rest this fundamental transaction, in point of authority, upon grounds the least liable to cavil, we are bound both in justice and gratitude to add, that it was conducted with a temper and moderation[9] which naturally

(8) This is not the only instance in which the learned commentator's abstract love of liberty, coupled with his reverence for the constitution as it is established has involved him in a political fallacy. By what process of reasoning it can be demonstrated, that it is our duty to acquiesce in the determinations of our ancestors, though they were bound by no such obligation with regard to theirs, is not easily to be conceived. Yet such is by plain and natural inference a proposition of our author. The principle that a people have the right to choose and to regulate their own form of government, if true in 1688, does not become false, by the lapse of time, in 1843; and reasoning *a priori*, it may be more safely exercised now than at any antecedent period, because the science of government is better understood. The respect and attachment due to the institutions of a free state like ours, so far from being compromised, are included and avowed in this sentiment. And the learned commentator might have better urged the improbability of the nation again having occasion to exercise this power over the constitution, than have enforced the obligation to maintain the constitution, because we are born under it.—[CHITTY].

(9) The unusual combination of favourable circumstances which attended this revolution and the temper and moderation of its conductors are well commented upon by Mr. Hallam (Con. Hist. vol. iii. p. 121. See also Professor Smyth's Lect. on Hist. vol. ii. p. 68).

arose from its equity; that, however it might in some respects go beyond the letter of our ancient laws (the reason of which will more fully appear hereafter [z]), it was agreeable to the spirit of our constitution, and the rights of human nature; and that though in other points (owing to the peculiar circumstances of things and persons) it was not altogether so perfect as might have been wished, yet from thence a new era commenced, in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of the English history. In particular it is worthy observation that the convention, in this their judgment, avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that this misconduct of king James amounted to an *endeavour* to subvert the constitution; and not to an actual subversion, or total dissolution, of the government, according to the principles of Mr. Locke [a]: which would have reduced the society almost to a state of nature; would have levelled all distinctions of honour, rank, offices, and property; would have annihilated the sovereign power, and in consequence have repealed all positive laws; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity. They therefore very prudently voted it to amount to no more than an abdication of the government, and a consequent vacancy of the throne; whereby
[214] the government was allowed to subsist, though the executive magistrate was gone, and the kingly office to remain, though king James was no longer king [b]. And thus the constitution was kept entire; which upon every sound principle of government must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished, or even suspended.

This single postulatum, the vacancy of the throne, being once established, the rest that was then done followed almost of course. For, if the throne be at any time vacant (which may happen by other means besides that of abdication; as

[z] See chap. 7. [a] On Gov. p. 2, c. 19. [b] Law of forfeit. 118, 119.

if all the blood royal should fail, without any successor appointed by parliament); if, I say, a vacancy by any means whatsoever should happen, the right of disposing of this vacancy seems naturally to result to the lords and commons, the trustees and representatives of the nation. For there are no other hands in which it can so properly be intrusted; and there is a necessity of its being intrusted somewhere, else the whole frame of government must be dissolved and perish. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy in such a manner as they judged the most proper. And this was done by their declaration of 12 February, 1688 [c], in the following manner: "that William and Mary, prince and princess of Orange, be, and be declared king and queen, to hold the crown and royal dignity during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said prince of Orange, in the names of the said prince and princess, during their joint lives: and after their deceases the said crown and royal dignity to be to the heirs of the body of the said princess; and for default of such issue to the princess Anne of Denmark and the heirs of her body; and for default of such issue to the heirs of the body of the said prince of Orange."

William and Mary.

Perhaps, upon the principles before established, the convention might (if they pleased) have vested the regal dignity in a family entirely new, and strangers to the royal blood; but they were too well acquainted with the benefits of hereditary succession, and the influence which it has by custom over the minds of the people, to depart any farther from the ancient line than temporary necessity and self-preservation required. They therefore settled the crown, first on king William and queen Mary, king James's eldest daughter, for their joint lives: then on the survivor of them; and then on the issue of queen Mary: upon failure of such issue, it was limited to the princess Anne, king James's second daughter, and her issue; and lastly, on failure of that to the issue of king William, who was the grandson of

[215]

[c] Com. Journ. 12 Feb. 1688.

Charles the First, and nephew as well as son-in-law of king James the Second, being the son of Mary his eldest sister. This settlement included all the protestant posterity of king Charles I. except such other issue as king James might at any time have, which was totally omitted, through fear of a popish succession. And this order of succession took effect accordingly.

These three princes therefore, king William, queen Mary, and queen Anne, did not take the crown by hereditary right or *descent*, but by way of donation or *purchase*, as the lawyers call it; by which they mean any method of acquiring an estate otherwise than by descent. The new settlement did not merely consist in excluding king James, and the person pretended to be prince of Wales, and then suffering the crown to descend in the old hereditary channel: for the usual course of descent was in some instances broken through; and yet the convention still kept it in their eye, and paid a great, though not total, regard to it. Let us see how the succession would have stood, if no abdication had happened, and king James had left no other issue than his two daughters queen Mary and queen Anne. It would have stood thus: queen Mary and her issue: queen Anne and her issue; king William and his issue. But we may
[216] remember, that queen Mary was only nominally queen, jointly with her husband king William, who alone had the regal power; and king William was personally preferred to queen Anne, though his issue was postponed to hers. Clearly therefore these princes were successively in possession of the crown by a title different from the usual course of descent [10].

(10) "What the Revolution did for us," says Mr. Hallam (Const. Hist. vol. iii. pp. 125, 135), "was this; it broke a spell that had charmed the nation. It cut up by the roots all that theory of indefeasible right, of paramount prerogative, which had put the crown in continual opposition to the people. So long as the monarchs found at their side the pliant lawyers, who held the prerogative to be uncontrollable by statutes, a doctrine of itself destructive to any scheme of reconciliation or compromise between a king and his subjects; and churchmen, whose casuistry denied that the most intolerable tyranny could excuse resistance to a lawful government, all national liberty must be precarious.—The convention pronounced, under the slight disguise of a word unusual in the language of English law, that the actual sovereign had forfeited his right to the nation's allegiance. It swept away by

It was towards the end of king William's reign, when all hopes of any surviving issue from any of these princes died with the duke of Gloucester, that the king and parliament thought it necessary again to exert their power of limiting and appointing the succession, in order to prevent another vacancy of the throne; which must have ensued upon their deaths, as no farther provision was made at the Revolution, than for the issue of queen Mary, queen Anne, and king William. The parliament had previously by the statute of 1 W. & M. st. 2, c. 2, enacted, that every person who should be reconciled to, or hold communion with, the see of Rome, should profess the popish religion, or should marry a papist, should be excluded and be for ever incapable to inherit, possess, or enjoy the crown; and that in such case the people should be absolved from their allegiance, and the crown should descend to such persons, being protestants, as would have inherited the same, in case the person so reconciled, holding communion, professing, or marrying, were naturally dead. To act therefore consistently with them-

the same vote the reversion of his posterity and of those who could claim the inheritance of the crown. It declared that, during an interval of nearly two months, there was no king of England; the monarchy lying, as it were, in abeyance from the 23rd of December to the 13th of February. It bestowed the crown on William, jointly with his wife indeed, but so that her participation of the sovereignty should be only in name. It postponed the succession of the princess Anne during his life. Lastly, it made no provision for any future devolution of the crown in failure of issue from those to whom it was thus limited, leaving that to the wisdom of future parliaments."—"Although the constitution of England," continues this invaluable historian, "always, or at least since the admission of the commons into the Legislature, partook of the three simple forms, still, until the fall of the house of Stuart, the monarchical principle had in general predominated over the other two. Between the Revolution of 1688, and the death of George 2, the aristocratic principle seems to have predominated, the royal prerogative being in some respects too limited, and, in others, too little capable of effectual exercise to counterbalance the hereditary peerage, and the great landed proprietors, who in a political division, are to be reckoned among the proper aristocracy." During the last century, and especially during the last quarter of it, it seems equally just to say, that the democratic principle has been slowly emerging from insignificance, until at length it has taken up, and entrenched itself in, the position assigned to it in the theory of our constitution;—and it will be for posterity to determine whether, from this position, the democratic principle under the name of "public opinion," "the will of the people," or any other disguise, is, in its turn, to predominate over the other two, or whether the balance of our constitution is to be considered as being now finally adjusted.

selves, and at the same time pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the princess Sophia, electress and duchess dowager of Hanover, the most accomplished princess of her age [d]. For, upon the impending extinction of the protestant posterity of Charles the First, the old law of regal descent directed them to recur to the descendants of James the First; and the princess Sophia, being the youngest
[217] daughter of Elizabeth queen of Bohemia, who was the daughter of James the First, was the nearest of the ancient blood royal, who was not incapacitated by professing the popish religion. On her therefore, and the heirs of her body, being protestants, the remainder of the crown, expectant on the death of king William and queen Anne, without issue, was settled by statute 12 & 13 Wm. III. c. 2. And at the same time it was enacted that whosoever should hereafter come to the possession of the crown should join in the communion of the church of England as by law established.

This is the last limitation of the crown that has been made by parliament: and these several actual limitations, from the time of Henry IV. to the present, do clearly prove the power of the king and parliament to new-model or alter the succession. And indeed it is now again made highly penal
Anne. to dispute it: for by the statute 6 Ann. c. 7, it is enacted, that if any person maliciously, advisedly, and directly, shall maintain, by writing or printing, that the kings of this realm with the authority of parliament are not able to make laws to bind the crown and the descent thereof, he shall be guilty of high treason; or if he maintains the same by only preaching, teaching, or advised speaking, he shall incur the penalties of a *præmunire*.

The princess Sophia dying before queen Anne, the inheritance thus limited descended on her son and heir king
George I. George the First, and, having on the death of the queen taken effect in his person, from him it descended to his late
George II. majesty king George the Second; and from him to his

[d] Sandford in his genealogical history, published A.D. 1677, speaking (page 535) of the princesses Elizabeth, Louisa, and Sophia, daughters of the queen of Bohemia, says, the first was reputed the most learned, the second the greatest artist, and the last, one of the most accomplished ladies in Europe.

grandson and heir our present gracious sovereign, king George the Third [11]. George III.

Hence it is easy to collect, that the title to the crown is at present hereditary, though not quite so absolutely hereditary as formerly; and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was king Egbert; then William the Conqueror; afterwards in James the First's time the two common stocks united, and so continued till the vacancy of the throne in 1688: now it is the princess Sophia, in whom the inheritance was vested by the new king and parliament. [218] Formerly the descent was absolute, and the crown went to the next heir without any restriction: but now, upon the new settlement, the inheritance is conditional; being limited to such heirs only, of the body of the princess Sophia, as are protestant members of the church of England, and are married to none but protestants.

And in this due medium consists, I apprehend, the true constitutional notion of the right of succession to the imperial crown of these kingdoms. The extremes between which it steers, are each of them equally destructive of those ends for which societies were formed and are kept on foot. Where the magistrate, upon every succession, is elected by the people, and may by the express provision of the laws be deposed (if not punished) by his subjects, this may sound like the perfection of liberty, and look well enough when delineated on paper: but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand, divine indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely of all constitutions the most thoroughly slavish and dreadful. But when such an hereditary right, as our laws have created and vested in the royal stock, is closely interwoven with

(11) From him it descended to his eldest son king George the Fourth, who dying without issue, was succeeded by king William the Fourth, the third son of king George the Third; the second son Frederick Augustus duke of York having previously died without issue. On the death of king William the Fourth, the inheritance descended to the only child of Edward duke of Kent, the fourth son of king George the Third, our present gracious sovereign Queen Victoria, whom God long preserve.

those liberties, which, we have seen in a former chapter, are equally the inheritance of the subject; this union will form a constitution, in theory the most beautiful of any, in practice the most approved, and, I trust, in duration the most permanent. It was the duty of an expounder of our laws to lay this constitution before the student in its true and genuine light: it is the duty of every good Englishman to understand, to revere, to defend it.

CHAPTER IV.

OF THE KING'S ROYAL FAMILY.

THE first and most considerable branch of the king's royal family, regarded by the laws of England, is the *queen*. Of the queen.

The queen of England is either queen *regent*, queen *consort*, or queen *dowager*. The queen *regent*, *regnant*, or *sovereign*, is she who holds the crown in her own right; as the first (and perhaps the second) queen Mary, queen Elizabeth, and queen Anne [1]; and such a one has the same powers, prerogatives, rights, dignities, and duties, as if she had been a king. This was observed in the entrance of the last chapter, and is expressly declared by statute 1 Mar. I. st. 3, c. 1. But the queen *consort* is the wife of the reigning king; and she, by virtue of her marriage, is participant of divers prerogatives above other women [a]. Queen regent. Queen consort.

[220]

And, first, she is a public person, exempt and distinct from the king: and not, like other married women, so closely connected as to have lost all legal or separate existence so long as the marriage continues. For the queen is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and do other acts of ownership, without the concurrence of her lord: which no other married woman can do [b]; a privilege as old as the Saxon era [c]. She is also capable of taking a grant from the king, which no other wife is from her husband; and in this particular she agrees with the *Augusta*, or *piissima regina conjux divi imperatoris* of the Roman laws; who, according to Justinian [d], was equally Her separate and distinct rights.

[a] Finch. L. 86.
[b] 4 Rep. 23.
[c] Seld. Jan. Angl. 1, 42.
[d] Cod. 5, 16, 26.

(1) To whom may be added our present gracious sovereign Queen Victoria.

capable of making a grant to, and receiving one from, the emperor. The queen of England hath separate courts and officers distinct from the king's, not only in matters of ceremony, but even of law; and her attorney and solicitor-general are entitled to a place within the bar of his majesty's courts, together with the king's counsel [e]. She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will [2]. In short, she is in all legal proceedings looked upon as a feme sole, and not as a feme covert; as a single, not as a married woman [f]. For which the reason given by sir Edward Coke is this: because the wisdom of the common law would not have the king (whose continual care and study is for the public, and *circa ardua regni*) to be troubled and disquieted on account of his wife's domestic affairs; and therefore it vests in the queen a power of transacting her own concerns, without the intervention of the king, as if she was an unmarried woman.

Her exemptions.

The queen hath also many exemptions, and minute prerogatives. For instance: she pays no toll [g]; nor is she liable to any amercement in any court [h]. But in general, unless where the law has expressly declared her exempted, she is upon the same footing with other subjects; being to all intents and purposes the king's subject, and not his equal; in like manner as, in the imperial law, "*Augusta legibus soluta non est* [i]."

[221]

Her revenue.

The queen hath also some pecuniary advantages, which form her a distinct revenue: as, in the first place, she is entitled to an ancient perquisite called queen-gold, or *aurum reginæ;* which is a royal revenue, belonging to every queen consort during her marriage with the king, and due from every person who hath made a voluntary offering or fine to the king amounting to ten marks or upwards, for and in consideration of any privileges, grants, licenses, pardons, or

[e] Seld. tit. hon. 1, 6, 7.
[f] Finch. L. 86; Co. Litt. 133.
[g] Co. Litt. 133.
[h] Finch. L. 185.
[i] Ff. 1, 3, 31.

(2) This is expressly declared by 39 & 40 Geo. 3, c. 88, s. 89. If she neglect to dispose of them they go to the king her husband. (Wood's Inst. p. 22). See also the 2 Geo. 3, c. 1; 15 Geo. 3, c. 33; 47 Geo. 3, st. 2, c. 45.

other matter of royal favour conferred upon him by the king: and it is due in the proportion of one-tenth part more, over and above the entire offering or fine made to the king; and becomes an actual debt of record to the queen's majesty by the mere recording of the fine [k]. As, if an hundred marks of silver be given to the king for liberty to take in mortmain, or to have a fair, market, park, chase, or free-warren: there the queen is entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen-gold, or *aurum reginæ* [l]. But no such payment is due for any aids or subsidies granted to the king in parliament or convocation; nor for fines imposed by courts on offenders, against their will; nor for voluntary presents to the king, without any consideration moving from him to the subject; nor for any sale or contract whereby the present revenues or possessions of the crown are granted away or diminished [m].

The original revenue of our ancient queens, before and soon after the Conquest, seems to have consisted in certain reservations or rents out of the demesne lands of the crown, which were expressly appropriated to her majesty, distinct [222] from the king. It is frequent in domesday book, after specifying the rent due to the crown, to add likewise the quantity of gold or other renders reserved to the queen [n]. These were frequently appropriated to particular purposes: to buy wool for her majesty's use [o], to purchase oil for her lamps [p], or to furnish her attire from head to foot [q], which was frequently very costly, as one single robe in the fifth year of Henry II. stood the city of London in upwards of fourscore pounds [r]. A practice somewhat similar to that of the eastern

[k] Pryn. Aur. Reg. 2.

[l] 12 Rep. 21; 4 Inst. 358.

[m] Ibid. Pryn. 6; Madox. hist. exch. 242.

[n] *Bedefordscire Maner. Lestone redd. per annum xxii lib. &c., ad opus reginæ ii uncias auri.——Herefordscire. In Lene, &c. consuetud. ut præpositus manerii veniente domina sua (regina) in maner, præsentaret ei xviii oras denar. ut esset ipsa læto animo.* Pryn. Append. to Aur. Reg. 2, 3.

[o] *Causa coadunandi lanam reginæ.* Domesd. ibid.

[p] *Civitas Lundon. Pro oleo ad lamp. ad reginæ.* (*Mag. rot. pip. temp. Hen. II. ibid.*)

[q] *Vicecomes Berkescire, xvi l. pro cappa reginæ.* (*Mag. rot. pip.* 19.—22 *Hen. II. ibid.*) *Civitas Lund. cordubanario reginæ xx s.* (*Mag. rot.* 2 *Hen. II.* Madox. hist. exch. 419).

[r] *Pro roba ad opus reginæ quater xx l. & vi s. viii d.* (*Mag. rot.* 5 *Hen. II. ibid.* 250).

countries, where whole cities and provinces were specifically assigned to purchase particular parts of the queen's apparel [s]. And, for a farther addition to her income, this duty of queen-gold is supposed to have been originally granted; those matters of grace and favour, out of which it arose, being frequently obtained from the crown by the powerful intercession of the queen. There are traces of its payment, though obscure ones, in the book of domesday and in the great pipe-roll of Henry the First [t]. In the reign of Henry the Second the manner of collecting it appears to have been well understood, and it forms a distinct head in the ancient dialogue of the exchequer [u] written in the time of that prince, and usually attributed to Gervase of Tilbury. From that time downwards it was regularly claimed and enjoyed by all the queen consorts of England till the death of Henry VIII.; though after the accession of the Tudor family the
[223] collecting of it seems to have been much neglected: and, there being no queen consorts afterwards till the accession of James I., a period of near sixty years, its very nature and quantity became then a matter of doubt: and being referred by the king to the chief justices and chief baron, their report of it was so very unfavourable [v], that his consort queen Anne (though she claimed it) yet never thought proper to exact it. In 1635, 11 Car. I., a time fertile of expedients for raising money upon dormant precedents in our old records (of which ship-money was a fatal instance), the king, at the petition of his queen, Henrietta Maria, issued out his writ [w] for levying it: but afterwards purchased it of his consort at the price of ten thousand pounds; finding it, perhaps, too trifling and troublesome to levy. And when afterwards, at the Restoration, by the abolition of the military tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced to almost nothing at all, in vain did Mr. Prynne, by a treatise which does honour to

[s] *Solere aiunt barbaros reges Persarum ac Syrorum—uxoribus civitates attribuere, hoc modo; hæc civitas mulieri redimiculum præbeat, hæc in collum, hæc in crines, &c.* (Cic. in Verrem. lib. 3, cap. 33).

[t] See Madox. Disceptat. epistolar. 74; Pryn. Aur. Reg. Append. 5.

[u] Lib. 2, c. 26.

[v] Mr. Prynne, with some appearance of reason, insinuates, that their researches were very superficial. (Aur. Reg. 125.)

[w] 19 Rym. Fœd. 721.

his abilities as a painful and judicious antiquary, endeavour to excite queen Catherine to revive this antiquated claim.

Another ancient perquisite belonging to the queen consort, mentioned by all our old writers[x], and therefore only worthy notice, is this: that on the taking of a whale on the coasts, which is a royal fish, it shall be divided between the king and queen; the head only being the king's property, and the tail of it the queen's. "*De sturgione observetur, quod rex illum habebit integrum: de balena vero sufficit, si rex habeat caput, et regina caudam.*" The reason of this whimsical division, assigned by our ancient records[y], was to furnish the queen's wardrobe with whalebone[3].

But farther: though the queen is in all respects a subject, yet, in point of the security of her life and person, she is put on the same footing with the king. It is equally treason (by the statute 25 Edw. III.,) to compass or imagine the death of our lady the king's companion, as of the king himself: and [224] to violate, or defile the queen consort, amounts to the same high crime; as well in the person committing the fact, as in the queen herself, if consenting. A law of Henry the Eighth[z] made it treason also for any woman, who was not a virgin, to marry the king without informing him thereof: but this law was soon after repealed[4], it trespassing too strongly, as well on natural justice, as female modesty. If however the queen be accused of any species of treason, she shall (whether consort or dowager) be tried by the peers of parliament, as queen Ann Boleyn was in 28 Henry VIII.

The husband of a queen regnant, as prince George of Denmark was to queen Anne[5], is her subject; and may be

The husband of the queen.

[x] Bracton, l. 3, c. 3; Britton, c. 17; Flet. l. 1, c. 45 & 46.

[y] Pryn. Aur. Reg. 127.

[z] Stat. 33 Hen. VIII. c. 21.

(3) The reason is more whimsical than the division, for the whalebone lies entirely in the head.—[CHRISTIAN].

(4) By the 1 Edw. 6, c. 12, which abrogated all treasons created since 25 Edw. 3.

(5) Or his Royal Highness Prince Albert to her Majesty Queen Victoria. See 3 & 4 Vict. cc. 1 & 2, by which his Royal Highness was naturalized into this realm, without the restrictions provided by 1 Geo. 1, stat. 2, c. 4, subject only to the condition of taking the oaths of allegiance and supremacy before the lord chancellor. By 3 & 4 Vict. c. 3, s. 1, her Majesty was empowered to grant to his Royal Highness an annuity of 30,000*l.* per annum, payable out of the consolidated fund; it being also enacted (sect. 2), that his

guilty of high treason against her: but, in the instance of conjugal infidelity, he is not subjected to the same penal restrictions. For which the reason seems to be, that if a queen consort is unfaithful to the royal bed, this may debase or bastardize the heirs to the crown; but no such danger can be consequent on the infidelity of the husband to a queen regnant.

Queen dowager. A queen *dowager* is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high treason to conspire her death, or to violate her chastity, for the same reason as was before alleged, because the succession to the crown is not thereby endangered. Yet still, *pro dignitate regali*, no man can marry a queen dowager without special licence from the king, on pain of forfeiting his lands and goods. This sir Edward Coke[a] tells us was enacted in parliament in 6 Hen. VI., though the statute be not in print[6]. But she, though an alien born, shall still

[a] 2 Inst. 18. See Riley's Plac. Parl. 672.

Royal Highness shall not acquire or become entitled by his marriage to any estate or interest in any property real or personal, to which her Majesty may be or may become entitled to, in any right or manner whatsoever; but all such property shall be held and enjoyed by her Majesty, her heirs, and successors, as if such marriage had never taken place.

By 3 & 4 Vict. c. 52, s. 1, it is provided, that if on the demise of her Majesty there shall be issue of her Majesty, who shall become king or queen under eighteen years of age, his Royal Highness Prince Albert shall be guardian of such issue and shall exercise the royal power and authority under the title of regent of the United Kingdom. But before entering on his office of regent, he is required to take the oaths of allegiance and supremacy in the form prescribed by 1 Wm. & M. sess. 1, c. 8, the oath of abjuration as prescribed by 6 Geo. 3, c. 53, and also a special oath for the due execution of the said office of regent (sect. 3). There is a proviso, however, that the regent shall not give the royal assent to any bill for altering the succession to the crown as established by 12 Wm. 3, c. 2, or for the repeal or alteration of the Uniformity Act (13 & 14 Car. 2, c. 4), or the act for the security of the established church of Scotland (5 Anne, cc. 5 & 8, art. 25). It is also provided, that if his Royal Highness shall, at any time after becoming such guardian and regent, be reconciled to, or hold communion with the see of Rome, or shall profess the popish religion, or shall marry a person professing the Roman Catholic religion, or shall cease to reside in or absent himself from the United Kingdom, then and in any of such cases his Royal Highness shall no longer be guardian and regent, and all the powers and authorities which he may have derived under and by virtue of this act shall thenceforth cease and determine.

(6) What gave rise to this statute (if it ever were in fact an act of the Legislature) was the marriage of Catherine mother of Hen. 6, to Owen Tudor, a private Welsh gentleman. In Co. Lit. 133, Lord Coke refers to this

be entitled to dower after the king's demise, which no other alien is[b]. A queen dowager, when married again to a subject, doth not lose her regal dignity, as peeresses dowager do their peerage when they marry commoners. For Catharine, queen dowager of Henry V., though she married a private gentleman, Owen ap Meredith ap Theodore, commonly called [225] Owen Tudor: yet, by the name of Catharine queen of England, maintained an action against the bishop of Carlisle. And so, the queen dowager of Navarre marrying with Edmond earl of Lancaster, brother to king Edward the First, maintained an action of dower (after the death of her second husband) by the name of queen of Navarre[c].

Prince and princess of Wales, and princess royal.

The prince of Wales or heir apparent to the crown, and also his royal consort, and the princess royal, or eldest daughter of the king, are likewise peculiarly regarded by the laws. For, by statute 25 Edw. III., to compass or conspire the death of the former, or to violate the chastity of either of the latter, are as much high treason as to conspire the death of the king, or violate the chastity of the queen. And this upon the same reason as was before given; because the prince of Wales is next in succession to the crown, and to violate his wife might taint the blood royal with bastardy; and the eldest daughter of the king is also alone inheritable[7] to the crown, on failure of issue male, and therefore more respected by the laws than any of her younger sisters; insomuch that upon this, united with other (feodal) principles, while our military tenures were in force, the king might levy an aid for marrying his eldest daughter, and her only. The heir apparent[8] to the

[b] Co. Litt. 31 b. [c] 2 Inst. 50.

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act as 8 Hen. 6, No. 7, but in 2 Inst. 18, as 6 Hen. 6, No. 41. In Riley's Plac. Parl. it is called 2 Hen. 6. In Harg. Co. Lit. p. 133, its existence as a statute is doubted.

(7) The meaning of the learned commentator would have been better expressed by the appropriate legal phrase "sole heiress." (Vide supra, p. 194).

(8) When the first prince of Wales was created, it was upon Edward, the second son of Edward I., and not his eldest son Alphonso, that the new title was conferred; but Alphonso dying without issue, the prince of Wales became heir apparent to the crown, and thenceforth the title has never been conferred on any but the eldest sons and eldest daughters of the monarch. Mary and Elizabeth were created princesses of Wales by their father Hen. 8, each being at the time (the latter after the illegitimation of Mary) heiress presumptive to the crown.

crown is usually made prince of Wales and earl of Chester, by special creation and investiture; but being the king's eldest son, he is by inheritance[9] duke of Cornwall, without any new creation[d].

Younger sons and daughters.

The rest of the royal family may be considered in two different lights, according to the different senses in which the term, *royal family*, is used. The larger sense includes all those, who are by any possibility inheritable to the crown. Such, before the Revolution, were all the descendants of William the Conqueror; who had branched into an amazing extent, by intermarriages with the ancient nobility. Since the Revolution and Act of Settlement, it means the protestant issue of the princess Sophia; now comparatively few in number, but which in process of time may possibly be as largely diffused. The more confined sense includes only those, who are in a certain degree of propinquity to the reigning prince, and

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[d] 8 Rep. 1; Sold. tit. of hon. 2. 5.

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(9) It is, however, a very peculiar species of inheritance, and perhaps, is the only mode of descent which depends upon the authority of statute. In the *Prince's case* (8 Rep. 1), which arose upon the construction of the original grant of this dukedom to Edward the Black Prince by Edw. 3, in the eleventh year of his reign, it was decided that since the charter concluded with these words, "*per ipsum regem et totum concilium in parliamento*," it had the authority of an act of parliament, and therefore had power to create an estate descendible in a special mode, and by limitations wholly different from the established rules of descent.

In Lord Coke's report of this case, it is stated that the duchy of Cornwall cannot descend, upon the death of the king's first-born son, to the eldest then living. But this position is not law, for in the case of the duchy of Cornwall (reported Collins's Proceedings on Baronies, p. 148), it was resolved, that on the death of prince Henry the eldest son of James 1, prince Charles, the king's second son became the duke of Cornwall by inheritance. (See also 1 Vez. 294; 9 M. & W. 588).

Mr. Christian observes that, from several passages in the parliament roll, it seems that a duke of Cornwall is born of full age, or is subject to no minority with respect to his enjoyment of the possessions annexed to the dukedom. But doubts being entertained upon this point, the 5 & 6 Vict. c. 2, was passed to confirm all leases and grants of the said possessions, if for terms not exceeding thirty-one years, or for one, two, or three lives, or any term determinable on such lives (sect. 1, 2), or if for building or improving purposes for ninety-nine years (sect. 3), her Majesty being empowered (sect. 6), during the minority of his Royal Highness the Prince of Wales to exercise his rights and powers relating to the said duchy.

The gross revenues of the duchy for the year ending December 31, 1842, were 32,935*l.* 13*s.* 4½*d.*; the salaries and expenses, 12,835*l.* 13*s.* 4½*d.*, leaving a net revenue of 20,100*l.* for the Prince of Wales.

to whom therefore the law pays an extraordinary regard and respect: but, after that degree is past, they fall into the rank of ordinary subjects, and are seldom considered any farther, unless called to the succession upon failure of the nearer lines. For, though collateral consanguinity is regarded indefinitely, with respect to inheritance or succession, yet it is, and can only be regarded, within some certain limits in any other respect, by the natural constitution of things and the dictates of positive law[e].

The younger sons and daughters of the king, and other branches of the royal family, who are not in the immediate line of succession, were therefore little farther regarded by the ancient law, than to give them, to a certain degree, precedence before all peers and public officers, as well ecclesiastical as temporal. This is done by the statute 31 Hen. VIII. c. 10, which enacts, that no person, except the king's children, shall presume to sit or have place at the side of the cloth of estate in the parliament chamber; and that certain great officers therein named shall have precedence above all dukes, except only such as shall happen to be the king's son, brother, uncle, nephew (which sir Edward Coke[f] explains to signify grandson or *nepos*), or brother's or sister's son. Therefore, after these degrees are past, peers or others of the *blood royal* are entitled to no place or precedence except what belongs to them by their personal rank or dignity. Which made sir Edward Walker complain[g], that by the hasty creation of prince Rupert to be duke of Cumberland, and of the earl of Lennox to be duke of that name, previous to the creation of king Charles's second son, James, to be duke of York, it might happen that their grandsons would have precedence of the grandsons of the duke of York.

Indeed, under the description of the king's *children* his *grandsons* are held to be included, without having recourse to sir Edward Coke's interpretation of *nephew*: and therefore when his late majesty king George II. created his grandson Edward, the second son of Frederick prince of Wales deceased, duke of York, and referred it to the house of lords to settle his place and precedence, they certified[h] that he ought to have place next to the late duke of Cumberland, Grandsons. [225*]

[e] See *essay on collateral consanguinity*, in Law-tracts, 4to. *Oxon.* 1771.
[f] 4 Inst. 362.
[g] Tracts, p. 301.
[h] Lords' Journ. 24 Apr. 1760.

the then king's youngest son; and that he might have a seat on the left hand of the cloth of estate. But when, on the accession of his present majesty, those royal personages ceased to take place as the *children*, and ranked only as the *brother* and *uncle*, of the king, they also left their seats on the side of the cloth of estate: so that when the duke of Gloucester, his Majesty's second brother, took his seat in the house of peers [i], he was placed on the upper end of the earls' bench (on which the dukes usually sit) next to his royal highness the duke of York. And in 1718, upon a question referred to all the judges by king Geo. I., it was resolved by the opinion of ten against the other two [10], that the education and care of all the king's grandchildren while minors, did belong of right to his majesty as king of this realm, even during their father's life [k]. But they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges have more recently concurred in opinion [l], that this care and approbation extend also to the presumptive heir of the crown; though to what other branches of the royal family the same did extend they did not find precisely determined. The most frequent instances of the crown's interposition go farther than nephews and nieces [m]; but examples are not wanting of its reaching to more distant collaterals [n]. And

[i] Lords' Journ. 10 Jan. 1765.

[k] Fortesc. Al. 401—440.

[l] Lords' Journ. 28 Feb. 1772.

[m] See (besides the instances cited in Fortescue Aland) for *brothers* and *sisters*; under king Edward III., 4 Rym. 392, 403, 411, 501, 508, 512, 549, 683:—under Hen. V., 9 Rym. 710, 711, 741:—under Edw. IV., 11 Rym. 564, 565, 590, 601:—under Hen. VIII., 13 Rym. 249, 423:—under Edw. VI., 7 St. Tr. 3, 8. For *nephews* and *nieces*; under Hen. III., 1 Rym. 852:—under Edw. I., 2 Rym. 489:—under Edw. III., 5 Rym. 561:—under Rich. II., 7 Rym. 264:—under Rich. III., 12 Rym. 232, 244:—under Hen. VIII., 15 Rym. 26, 31.

[n] To *great nieces*; under Edw. II., 3 Rym. 575, 644. To *first cousins*; under Edw. III., 5 Rym. 177. To *second* and *third cousins*; under Edw. III., 5 Rym. 729:—under Rich. II., 7 Rym. 225:—under Hen. VI., 10 Rym. 322:—under Hen. VII., 12 Rym. 529:—under queen Elizabeth, Camd. Ann. A.D. 1562. To *fourth cousins*; under Hen. VII., 12 Rym. 329. To the *blood royal* in general; under Rich. II., 7 Rym. 787.

(10) The authorities and arguments of the two dissentient judges (Price and Eyre), are so full and cogent, that, if this question had arisen before the judges were independent of the crown, one would have been inclined to have suspected the sincerity of the other ten, and the authority of the decision. (See Harg. St. Tr. xi. 295).—[CHRISTIAN].

the statute 6 Henry VI. before mentioned, which prohibits the marriage of a queen dowager without the consent of the king, assigns this reason for it; "because the disparagement of the queen shall give greater comfort and example to other ladies of estate, who are of the *blood royal*, more lightly to disparage themselves[o]." Therefore by the statute 28 Hen. VIII. c. 18, (repealed, among other statutes of treasons, by 1 Edw. VI. c. 12), it was made high treason for any man to contract marriage with the king's children or reputed children, his sisters or aunts *ex parte paternâ*, or the children of his brethren or sisters; being exactly the same degrees, to which precedence is allowed by the statute 31 Hen. VIII. before mentioned. And now, by statute 12 Geo. III. c. 11 [11], no descendant of the body of king

[o] Ril. plac. parl. 672.

(11) This act was passed in consequence of the marriages of the king's brothers, the dukes of Gloucester and Cumberland, the former to the dowager-countess of Waldegrave, the latter to Mrs. Horton, daughter of Lord Irnham.

For the old doctrine as to the marriages of the royal family, the student is referred to the above-mentioned opinion of the judges, 1718 (Fortes. 401—440; Harg. St. Tr. vol. xi. p. 295; Howell's St. Tr. xv. 1195). See also the debates which took place, and the protests of the dissentient lords, on the Royal Marriage Act (12 Geo. 3, c. 11; Parl. Deb. vol. xvii., and Jour. of the House of Lords, 3rd March, 1772).

In the year 1831, the Royal Marriage Act became the subject of much public discussion from the following circumstances. In the year 1792, a marriage had been solemnized according to the liturgy and by a minister of the church of England, between his Royal Highness the Duke of Sussex and the Lady Augusta Murray, daughter of the Earl of Dunmore, both then resident at Rome. The celebration of the ceremony was preceded by a solemn written contract of marriage signed by both parties. Shortly afterwards they returned to England, and the ceremony was again performed according to the same rites. Lady Augusta died in 1830, leaving Sir Augustus D'Este and a daughter the sole issue of the marriage.

The Duke of Sussex being the fifth son of Geo. 3, and also being by creation Duke of Sussex in England, Earl of Inverness in Scotland, and Baron of Arklow in Ireland, with remainder to the heirs male of his body lawfully begotten, many grave and important questions affecting not only the above titles, but, under remote contingencies, that of the crown itself may arise. Three of these questions have recently been much discussed.

1. Whether the Royal Marriage Act extends to marriages by any descendants of Geo. 2, contracted and solemnized *bonâ fide* out of Great Britain, and beyond the limits of British jurisdiction? If this question should be decided in the negative, Sir Augustus D'Este is now entitled to all the above titles of his royal father, and will also inherit the crown of these realms, after failure of issue of her present Majesty, and issue of the Duke of Cumberland.

George II. (other than the issue of princesses married into foreign families) is capable of contracting matrimony, without the previous consent of the king signified under the great seal; and any marriage contracted without such consent is void. Provided, that such of the said descendants, as are above the age of twenty-five, may after a twelvemonth's notice, given to the king's privy council, contract and solemnize marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And all persons solemnizing, assisting, or being present at any such prohibited marriage, shall incur the penalties of the statute of *præmunire* [12].

But if this question should be decided in the affirmative it may still be doubted

2. Whether on failure of male issue of the Duke of Cumberland, Sir Augustus will not inherit the electorate of Hanover; the British parliament being clearly incompetent to disturb the electorate succession? And

3. Whether Sir Augustus is not now entitled to the barony of Arklow in Ireland; the Royal Marriage Act never having been adopted by the Irish parliament, and never having been extended to that country since the Union?

It may be mentioned that in 1794 a suit in the Court of Arches was commenced at the instigation of Geo. 3, in which a decree was taken, pronouncing the above-mentioned marriage void; and also that Sir Augustus D'Este, shortly after the death of his mother in 1830, filed a bill in chancery to perpetuate the testimony of the clergyman who performed the marriage ceremony (he being then upwards of eighty years of age) and that of other witnesses, in order that he might hereafter have the benefit of such testimony in establishing the said marriage, which it is now (1843) rumoured he is forthwith about to do. Further legal information on the subject will be found in Sir John Dillon's Essay on the Royal Marriage Act.

(12) By 3 & 4 Vict. c. 52, s. 4, it is enacted, that it shall not be lawful for the king or queen of this realm, for whom a regent is by the said act appointed, to intermarry before his or her age of eighteen years, with any person whomsoever without the consent in writing of the regent, and the assent of both houses of parliament, previously obtained; and every marriage without such consent, and such assent of the two houses of parliament, shall be null and void to all intents and purposes; and every person who shall be acting, aiding, abetting, or concerned in obtaining, procuring, or bringing about any such marriage, and the person who shall be so married to such king or queen under the age of eighteen years, shall be guilty of high treason, and suffer and forfeit as in cases of high treason.

CHAPTER V.

OF THE COUNCILS BELONGING TO THE KING.

THE third point of view, in which we are to consider the king, is with regard to his councils. For, in order to assist him in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath assigned him a diversity of councils to advise with. [227] The king's councils.

1. The first of these is the high court of parliament, whereof we have already [1] treated at large. 1. The parliament.

2. Secondly, the peers of the realm are by their birth hereditary counsellors of the crown, and may be called together by the king to impart their advice in all matters of importance to the realm, either in time of parliament, or, which hath been their principal use, when there is no parliament in being [a]. Accordingly Bracton [b], speaking of the nobility of his time, says they might probably be called "*consules, a consulendo; reges enim tales sibi associant ad consulendum.*" And in our law books [c], it is laid down, that peers are created for two reasons: 1. *Ad consulendum*, 2. *Ad defendendum, regem:* on which account the law gives them certain great and high privileges: such as freedom from arrests, &c. even when no parliament is sitting: because it intends, that they are always assisting the king with their counsel for the commonwealth, or keeping the realm in safety by their prowess and valour. 2. The peers.

Instances of conventions of the peers, to advise the king, [228]

[a] Co. Litt. 110.
[b] l. 1, c. 8.
[c] 7 Rep. 34; 9 Rep. 49; 12 Rep. 96.

(1) Vide supra, Chap. II.

have been in former times very frequent; though now fallen into disuse, by reason of the more regular meetings of parliament. Sir Edward Coke[d] gives us an extract of a record, 5 Hen. IV., concerning an exchange of lands between the king and the earl of Northumberland, wherein the value of each was agreed to be settled by advice of parliament (if any should be called before the feast of saint Lucia), or otherwise by advice of the grand council of peers which the king promises to assemble before the said feast, in case no parliament shall be called. Many other instances of this kind of meeting are to be found under our ancient kings: though the formal method of convoking them had been so long left off, that when king Charles I. in 1640, issued out writs under the great seal to call a great council of all the peers of England to meet and attend his majesty at York, previous to the meeting of the long parliament, the earl of Clarendon[e] mentions it as a new invention, not before heard of; that is, as he explains himself, so old, that it had not been practised in some hundreds of years. But though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet in cases of emergency, our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together: as was particularly the case with king James the Second, after the landing of the prince of Orange; and with the prince of Orange himself, before he called that convention parliament, which afterwards called him to the throne.

Besides this general meeting, it is usually looked upon to be the right of each particular peer of the realm to demand an audience of the king, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public weal. And therefore, in the reign of Edward II., it was made an article of impeachment in parliament against
[229] the two Hugh Spencers, father and son, for which they were banished the kingdom, "that they by their evil covin would not suffer the great men of the realm, the king's good counsellors, to speak with the king, or to come near him; but only in the presence and hearing of the said Hugh the father

[d] 1 Inst. 110. [e] Hist. B. 2.

and Hugh the son, or one of them, and at their will, and according to such things as pleased them [f]."

3. A third council belonging to the king are, according to sir Edward Coke [g], his judges of the courts of law, for law matters. And this appears frequently in our statutes, particularly 14 Edw. III. c. 5, and in other books of law. So that when the king's council is mentioned generally, it must be defined, particularized, and understood, *secundum subjectam materiam:* and if the subject be of a legal nature, then by the king's council is understood his council for matters of law; namely, his judges. Therefore when by statute 16 Ric. II. c. 5, it was made a high offence to import into this kingdom any papal bulls, or other processes from Rome; and it was enacted, that the offenders should be attached by their bodies, and brought before the king and his *council* to answer for such offence; here, by the expression of the king's *council*, were understood the king's judges of his courts of justice, the subject matter being legal: this being the general way of interpreting the word *council* [h] [2]. 3. The judges.

4. But the principal council belonging to the king is his privy council, which is generally called by way of eminence, *the council.* And this, according to sir Edward Coke's description of it [i], is a noble, honourable, and reverend assembly, of the king and such as he wills to be of his privy council, in the king's court or palace. The king's will is the sole constituent of a privy counsellor; and this also regulates their number, which of ancient time was twelve or thereabouts. Afterwards it increased to so large a number, that it was found inconvenient for secrecy and dispatch; and therefore king Charles the Second in 1679 limited it to thirty: whereof 4. The privy council.

[f] 4 Inst. 53.
[g] 1 Inst. 110.
[h] 3 Inst. 125.
[i] 4 Inst. 53.

(2) The right of the crown to consult the judges extrajudicially is a right to be understood with many exceptions and exercised with great caution, especially where the royal prerogative or authority is interested. In such cases, notwithstanding the independence of the judges, this right might easily be made an instrument for totally obstructing the course of justice, as was done by James I, in the great case of commendams, and Charles I, in the far more important case of ship money. Other instances of attempts by the crown (and on some few occasions by the House of Lords) to obtain answers from the judges to questions which might judicially come before them are collected in Fortesc. 382—392.

[230] fifteen were to be the principal officers of state, and those to be counsellors *virtute officii;* and the other fifteen were composed of ten lords and five commoners of the king's choosing [k]. But since that number has been much augmented, and now continues indefinite [3]. At the same time also the ancient office of lord president of the council [4] was revived in the person of Anthony earl of Shaftsbury; an officer, that by the statute of 31 Hen. VIII. c. 10, has precedence next after the lord chancellor and lord treasurer.

Their number.

How made.

Privy counsellors are *made* by the king's nomination, without either patent or grant; and, on taking the necessary oaths, they become immediately privy counsellors during the life of the king that chooses them, but subject to removal at his discretion.

Their qualification.

As to the *qualifications* of members to sit at this board; any natural-born subject of England is capable of being a member of the privy council; taking the proper oaths for security of the government, and the test [5] for security of the church. But, in order to prevent any persons under foreign attachments from insinuating themselves into this important trust, as happened in the reign of king William in many instances, it is enacted by the act of settlement [l], that no person born out of the dominions of the crown of England,

[k] Temple's Mem. part 3.

[l] Stat. 12 & 13 Wm. III. c. 2.

(3) Only a few of these, being actually honoured with the confidence of the sovereign, attend the meetings of the privy council, it having long been understood that no privy councillor should attend unless specially summoned. These form the "cabinet," "ministry," or "administration," and conduct the exercise of the royal authority and prerogative, and the actual government of the nation. Each of these is also invested with some high office of state; but they have no special appointment as members of the cabinet, which has, in the eye of the law, no existence. Each is responsible for those measures only to which he has individually consented. (See Hallam. Con. Hist. iii. 254).

(4) It appears from the fourth Inst. 55, that this office existed at the time of James 1; for Lord Coke says, "there is, and of ancient time has been, a president of the council. This office was never granted but by letters patent under the great seal, *durante bene placito*, and is very ancient; for John bishop of Norwich was president of the council, *in anno septimo regis Johannis. Dormivit tamen hoc officium regnante magna Elizabetha.*"—[CHRISTIAN].

(5) Now the declaration substituted in lieu of the sacramental test, which, as a qualification for office, was abolished by 9 Geo. 4, c. 17.

unless born of English parents, even though naturalized by parliament, shall be capable of being of the privy council.

The *duty* of a privy counsellor appears from the oath of office [m], which consists of seven articles: 1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honour and good of the public, without partiality through affection, love, meed, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be there resolved. 6. To withstand all persons who would attempt the contrary. And lastly, in general, 7. To observe, keep, and do all that a good and true counsellor ought to do to his sovereign lord. Their duty. [231]

The *power* of the privy council is to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But their jurisdiction herein is only to inquire, and not to punish: and the persons committed by them are entitled to their *habeas corpus* by statute 16 Car. I. c. 10, as much as if committed by an ordinary justice of the peace. And, by the same statute, the court of starchamber, and the court of requests, both of which consisted of privy counsellors, were dissolved; and it was declared illegal for them to take cognizance of any matter of property, belonging to the subjects of this kingdom. But, in plantation or admiralty causes, which arise out of the jurisdiction of this kingdom; and in matters of lunacy or idiocy [n], being a special flower of the prerogative; with regard to these, although they may eventually involve questions of extensive property, the privy council continues to have cognizance, being the court of appeal in such cases [6]; or rather, the appeal lies to the king's majesty himself in council. Whenever also a question arises between two provinces in America or elsewhere, as concerning the extent of their charters and the like, the king in his Their power.

[m] 4 Inst. 54.

[n] 3 P. Wms. 108.

(6) As also in appeals from the ecclesiastical and maritime courts (see 2 & 3 Wm. 4, c. 92; 3 & 4 Wm. 4, c. 41; 6 & 7 Vict. c. 38); applications for the extension of the term of letters patent or other matters relating thereto (see 5 & 6 Wm. 4, c. 83, amended by 2 & 3 Vict. c. 67); or for licenses to republish books after the death of the authors. (See 5 & 6 Vict. c. 45).

council exercises *original* jurisdiction therein, upon the principle of feodal sovereignty. And so likewise when any person claims an island or a province, in the nature of a feodal principality, by grant from the king or his ancestors, the determination of that right belongs to his majesty in council: as was the case of the earl of Derby with regard to the Isle of Man in the reign of queen Elizabeth, and the earl of Cardigan and others, as representatives of the duke of Montague, with relation to the island of St. Vincent in 1764. But from all the dominions of the crown, excepting Great
[232] Britain and Ireland, an *appellate* jurisdiction (in the last resort) is vested in the same tribunal; which usually exercises its judicial authority in a committee of the whole privy council, who hear the allegations and proofs, and make their report to his majesty in council, by whom the judgment is finally given [7].

Their privileges.

The *privileges* of privy counsellors, as such, (abstracted from their honorary precedence [o]), consist principally in the security which the law has given them against attempts and conspiracies to destroy their lives. For by statute 3 Hen. VII. c. 14, if any of the king's servants, of his household, conspire or imagine to take away the life of a privy counsellor, it is felony, though nothing be done upon it. The reason of making this statute, sir Edward Coke [p] tells us, was because

[o] See page 405.

[p] 3 Inst. 38.

(7) The jurisdiction and power of the privy council were entirely remodelled by 3 & 4 Wm. 4, c. 41, which created "the judicial committee of the privy council." This committee is composed of the president of the council, the lord chancellor, the chief justice of the court of queen's bench, the master of the rolls, the vice chancellor, the chief justice of the court of common pleas, the lord chief baron, the judge of the prerogative court, the judge of the high court of admiralty, the chief judge in bankruptcy, the members of the privy council who shall have held any of these offices, and two other privy councillors appointed by the king, who shall have held the office of judge in the East Indies, or any of the king's dominions beyond seas. This court has jurisdiction over all appeals made to the king in council from the courts of admiralty or any other court in the plantations of America and other his Majesty's dominions abroad. By this act (sect. 5), no appeal could be heard except before at least four members of this committee, of whom a majority must concur in the judgment.—But by 6 & 7 Vict. c. 38, s. 1, appeals and other matters may be heard before three members; and some further regulations have been made by the same statute for facilitating and regulating the business of this committee.

such a conspiracy was, just before this parliament, made by some of king Henry the Seventh's household servants, and great mischief was like to have ensued thereupon. This extends only to the king's menial servants. But the statute 9 Ann. c. 16, goes farther, and enacts, that *any person* that shall unlawfully attempt to kill, or shall unlawfully assault, and strike or wound, any privy counsellor in the execution of his office, shall be a felon without benefit of clergy. This statute was made upon the daring attempt of the sieur Guiscard, who stabbed Mr. Harley, afterwards earl of Oxford, with a penknife, when under examination for high crimes in a committee of the privy council[8].

The *dissolution* of the privy council depends upon the king's pleasure; and he may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. By the common law also it was dissolved *ipso facto* by the king's demise; as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being at the accession of a new prince, it is enacted by statute 6 Ann. c. 7, that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor. How dissolved.

(8) Both of the above statutes are now repealed. See 9 Geo. 4, c. 31.

CHAPTER VI.

OF THE KING'S DUTIES.

The duties of the king.

I PROCEED next to the duties incumbent on the king by our constitution; in consideration of which duties his dignity and prerogative are established by the laws of the land: it being a maxim in the law, that protection and subjection are reciprocal[a]. And these reciprocal duties are what, I apprehend, were meant by the convention in 1688, when they declared king James had broken the *original* contract between king and people. But however, as the terms of that original contract were in some measure disputed, being alleged to exist principally in theory, and to be only deducible by reason and the rules of natural law; in which deduction different understandings might very considerably differ; it was, after the Revolution, judged proper to declare these duties expressly, and to reduce that contract to a plain certainty. So that whatever doubts might be formerly raised by weak and scrupulous minds about the existence of such an original contract, they must now entirely cease; especially with regard to every prince who hath reigned since the year 1688.

To govern according to law.

The principal duty of the king is to govern his people according to law. *Nec regibus infinita aut libera potestas*, was the constitution of our German ancestors on the continent[b]. And this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest. "The king," saith Bracton[c], who wrote under Henry III., "ought not to be subject to man, but to God, and to the law; for the law

[234]

[a] 7 Rep. 5. [b] Tac. de mor. Germ. c. 7. [c] l. 1, c. 8

maketh the king. Let the king therefore render to the law, what the law has invested in him with regard to others; dominion and power: for he is not truly king, where will and pleasure rules, and not the law." And again [d], "the king also hath a superior, namely God, and also the law, by which he was made a king." Thus Bracton: and Fortescue also, [e] having first well distinguished between a monarchy absolutely and despotically regal, which is introduced by conquest and violence, and a political or civil monarchy, which arises from mutual consent (of which last species he asserts the government of England to be), immediately lays it down as a principle, that "the king of England must rule his people according to the decrees of the laws thereof: insomuch that he is bound by an oath at his coronation to the observance and keeping of his own laws." But, to obviate all doubts and difficulties concerning this matter, it is expressly declared by statute 12 & 13 Wm. III. c. 2, "that the laws of England are the birthright of the people thereof; and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws: and all their officers and ministers ought to serve them respectively according to the same: and therefore all the laws and statutes of this realm, for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, are ratified and confirmed accordingly."

The coronation oath contains the terms of the original contract.

And, as to the terms of the original contract between king and people, these I apprehend to be now couched in the coronation oath, which by the statute 1 W. & M. st. 1, c. 6, is to be administered to every king and queen, who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of all the people; who on their parts do reciprocally take the oath of allegiance to the crown. This coronation oath is conceived in the following terms:

"*The archbishop or bishop shall say*, Will you solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and cus- [235]

[d] l. 2, c. 16, § 3. [e] cc. 9 & 34.

toms of the same?—*The king or queen shall say*, I solemnly promise so to do.——*Archbishop or bishop.* Will you to your power cause law and justice, in mercy, to be executed in all your judgments?—*King or queen.* I will.——*Archbishop or bishop.* Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and the protestant reformed religion established by the law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them?—*King or queen.* All this I promise to do.—— *After this the king or queen, laying his or her hand upon the holy gospels, shall say*, The things which I have here before promised I will perform and keep: So help me God: *and then shall kiss the book.*"

This is the form of the coronation oath, as it is now prescribed by our laws; the principal articles of which appear to be at least as ancient as the mirror of justices[f], and even as the time of Bracton[g]: but the wording of it was changed at the Revolution, because (as the statute alleges) the oath itself had been framed in doubtful words and expressions, with relation to ancient laws and constitutions at this time
[236] unknown[h]. However, in what form soever it be conceived, this is most indisputably a fundamental and original express contract; though doubtless the duty of protection is impliedly

[f] cap. 1, § 2.

[g] l. 3, tr. 1, c. 9.

[h] In the old folio abridgment of the statutes, printed by Lettou and Machlinia in the reign of Edward IV. (*penes me*) there is preserved a copy of the old coronation oath; which, as the book is extremely scarce, I will here transcribe. *Ceo est le serement que le roy jurre a soun coronement: que il gardera et meintenera lez droitez et lez franchisez de seynt esglise grauntez auncienment dez droitz roys christiens d'Engletere, et quil gardera toutez sez terrez, honoures et dignites droiturelx et franks del coron du roialme d'Engletere en tout maner dentierte sanz null maner damenusement, et lez droitez dispergez dilapidez ou perduz de la corone a soun poiair reappeller en launcien estate, et quil gardera le peas de seynt esglise et al clergie et al people de bon accorde, et quil face faire en toutez sez jugementez owel et droit justice oue discretion et misericorde, et quil grauntera a tenure lez leyes et custumez du roialme, et a soun poiar lez face garder et affirmer que lez gentez du people avont faitez et esliez, et les malveys leyz et custumes de tout oustera, et ferme peas et establie al people de soun roialme en ceo garde esgardera a soun poiair; come Dieu luy aide.* (*Tit. sacramentum regis, fol. m. ij.*) Prynne has also given us a copy of the coronation oaths of Richard II., (Signal Loyalty, II. 246.) Edward VI., (ibid. 251.) James I., and Charles I., (ibid. 269).

as much incumbent on the sovereign before coronation as after: in the same manner as allegiance to the king becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or whether he ever takes it at all. This reciprocal duty of the subject will be considered in its proper place. At present we are only to observe, that in the king's part of this original contract are expressed all the duties that a monarch can owe to his people: *viz.* to govern according to law; to execute judgment in mercy; and to maintain the established religion. And, with respect to the latter of these three branches, we may farther remark, that by the act of union, 5 Ann. c. 8, two preceding statutes are recited and confirmed; the one of the parliament of Scotland, the other of the parliament of England: which enact; the former, that every king at his accession shall take and subscribe an oath, to preserve the protestant religion and presbyterian church government in Scotland; the latter, that at his coronation he shall take and subscribe a similar oath, to preserve the settlement of the church of England within England, Ireland, Wales, and Berwick, and the territories thereunto belonging.

CHAPTER VII.

OF THE KING'S PREROGATIVE.

IT was observed in a former chapter[a], that one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the king's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which, in all states impliedly, and in ours most expressly, subsists between the prince and the subject. It will now be our business to consider this prerogative minutely; to demonstrate its necessity in general; and to mark out in the most important instances its particular extent and restrictions: from which considerations this conclusion will evidently follow, that the powers, which are vested in the crown by the laws of England, are necessary for the support of society; and do not intrench any farther on our *natural* liberties, than is expedient for the maintenance of our *civil*[1].

There cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining with decency and respect, the limits of the king's prerogative. A topic, that in some former ages was thought too delicate and sacred to be profaned by the pen

[a] Chap. 1, page 141.

(1) The prerogatives of the crown are not given for the personal advantage of the king; but they are allowed to exist because they are beneficial to the subject. They are, therefore, to be guarded on account of the public; they are not to be extended farther than the laws and constitution of the country have allowed them, but within these bounds they are entitled to every protection. (Lord Kenyon, 4 T. R. 410; see also Lord Hardwicke's observations in 3 Atk. 171).

of a subject. It was ranked among the *arcana imperii*; and, like the mysteries of the *bona dea*, was not suffered to be pried [238] into by any but such as were initiated in its service: because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober inquiry. The glorious queen Elizabeth herself made no scruple to direct her parliaments to abstain from discoursing of matters of state[b]; and it was the constant language of this favourite princess and her ministers, that even that august assembly "ought not to deal, to judge, or to meddle with her majesty's prerogative royal[c]." And her successor, king James the First, who had imbibed high notions of the divinity of regal sway, more than once laid it down in his speeches, that "as it is atheism and blasphemy in a creature to dispute what the deity may do, so it is presumption and sedition in a subject to dispute what a king may do in the height of his power: good christians (he adds) will be content with God's will, revealed in his word; and good subjects will rest in the king's will, revealed in *his* law[d]"

Origin of the royal prerogative.

But, whatever might be the sentiments of some of our princes, this was never the language of our ancient constitution and laws. The limitation of the regal authority was a first and essential principle in all the Gothic systems of government established in Europe; though gradually driven out and overborne, by violence and chicane, in most of the kingdoms on the continent[2]. We have seen, in the preceding chapter, the sentiments of Bracton and Fortescue, at the distance of two centuries from each other. And sir Henry Finch, under Charles the First, after the lapse of two centuries more, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general restriction, in regard to the liberties of the people. "The king hath a prerogative in all things that are not injurious to the subject; for in them all it must be remembered, that the king's prerogative stretcheth not to the doing of any wrong[e]." *Nihil enim aliud* [239] *potest rex, nisi id solum quod de jure potest*[f]. And here it

[b] D'Ewes, 479.
[c] Ibid. 645.
[d] King James's works, 557, 531.
[e] Finch. L. 84, 85.
[f] Bracton, l. 3, tr. 1, c. 9.

(2) See Allen's Enquiry into the Rise and Growth of the Royal Prerogative.

may be some satisfaction to remark, how widely the civil law differs from our own, with regard to the authority of the laws over the prince, or (as a civilian would rather have expressed it) the authority of the prince over the laws. It is a maxim of the English law, as we have seen from Bracton, that "*rex debet esse sub lege, quia lex facit regem:*" the imperial law will tell us, that, "*in omnibus imperatoris excipitur fortuna; cui ipsas leges Deus subjecit*[g]." We shall not long hesitate to which of them to give the preference, as most conducive to those ends for which societies were framed, and are kept together; especially as the Roman lawyers themselves seem to be sensible of the unreasonableness of their own constitution. "*Decet tamen principem,*" says Paulus, "*servare leges, quibus ipse solutus est*[h]." This is at once laying down the principle of despotic power, and at the same time acknowledging its absurdity.

Etymology of prerogative.

By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology (from *prae* and *rogo*) something that is required or demanded before, or in preference to, all others[3]. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore Finch[i] lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject.

Prerogatives are either direct, [240]

Prerogatives are either *direct* or *incidental*. The *direct* are such positive substantial parts of the royal character and authority, as are rooted in and spring from the king's political person, considered merely by itself, without reference to any

[g] Nov. 105, § 2. [h] Ff. 32, 1, 23. [i] Finch. L. 85.

(3) So in the inductive philosophy "prerogative instances are those which, by possessing singular and eccentrical qualities, are primarily to be inquired into." (Bac. Nov. Org.) For other derivations of this word, see Thomas's edition of Co. Litt. vol. i. p. 72, 90 b.

other extrinsic circumstance; as, the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are *incidental* bear always a relation to something else, distinct from the king's person; and are indeed only exceptions, in favour of the crown, to those general rules that are established for the rest of the community; such as, that no costs shall be recovered against the king; that the king can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects. These and an infinite number of other instances, will better be understood, when we come regularly to consider the rules themselves, to which these incidental prerogatives are exceptions. And therefore we will at present only dwell upon the king's substantive or direct prerogatives.

or incidental.

These substantive or direct prerogatives may again be divided into three kinds: being such as regard, first, the king's royal *character;* secondly, his royal *authority;* and, lastly, his royal *income.* These are necessary, to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government, without all of which it is impossible to maintain the executive power in due independence and vigour. Yet in every branch of this large and extensive dominion, our free constitution has interposed such reasonable checks and restrictions, as may curb it from trampling on those liberties, which it was meant to secure and establish. The enormous weight of prerogative, if left to itself (as in arbitrary governments it is), spreads havoc and destruction among all the inferior movements; but, when balanced and regulated (as with us) by its proper counterpoise, timely and judiciously applied, its operations are then equable and certain, it invigorates the whole machine, and enables every part to answer the end of its construction.

Direct prerogatives relate either to the royal character, authority, or income.

In the present chapter we shall only consider the two first of these divisions, which relate to the king's political *character* and *authority;* or, in other words, his *dignity* and regal *power;* to which last the name of prerogative is frequently narrowed and confined. The other division, which forms the royal *revenue,* will require a distinct examination; according to the known distribution of the feodal writers, who distinguish the royal prerogatives into the *majora* and *minora regalia,* in the latter of which classes the rights of the revenue are ranked.

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For, to use their own words, "*majora regalia imperii præeminentiam spectant; minora vero ad commodum pecuniarium immediate attinent; et hæc proprie fiscalia sunt, et ad jus fisci pertinent*[k]."

I. Of the royal character or dignity.

First, then, of the *royal dignity*. Under every monarchical establishment, it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. For, though a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand, yet the mass of mankind will be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves. The law therefore ascribes to the king, in his high political character, not only large powers and emoluments, which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government. This is what I understand by the royal dignity, the several branches of which we will now proceed to examine.

(1). Sovereignty, or pre-eminence.

I. And, first, the law ascribes to the king the *attribute* of *sovereignty* or pre-eminence. "*Rex est vicarius*," says Bracton[l], "*et minister Dei in terra: omnis quidem sub eo est, et*
[242] *ipse sub nullo, nisi tantum sub Deo*[4]." He is said to have *imperial* dignity; and in charters before the Conquest is frequently styled *basileus* and *imperator*, the titles respectively assumed by the emperors of the east and west[m]. His realm is declared to be an *empire*, and his crown *imperial*, by many acts of parliament, particularly the statutes of 24 Hen. VIII. c. 12, and 25 Hen. VIII. c. 28[n]; which at the same time

[k] Peregrin. de jure fisc. l. 1, c. 1, num. 9.

[l] l. 1, c. 8.

[m] Seld. tit. of hon. I. 2.

[n] See also 24 Geo. II. c. 24; 5 Geo. III. c. 27.

(4) Vide supra, p. 234.

declare the king to be the supreme head of the realm in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man. Formerly there prevailed a ridiculous notion, propagated by the German and Italian civilians, that an emperor could do many things which a king could not (as the creation of notaries and the like), and that all kings were in some degree subordinate and subject to the emperor of Germany or Rome. The meaning therefore of the legislature, when it uses these terms of *empire* and *imperial*, and applies them to the realm and crown of England, is only to assert that our king is equally sovereign and independent within these his dominions, as any emperor is in his empire[o]; and owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court will be contemptible, unless that court had power to command the execution of it: but who, says Finch[p], shall command the king? Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more: and if such a power were vested in any domestic [243] tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

Remedies of the subject against the crown:

Are then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

for private injuries, by petition in chancery;

And, first, as to *private injuries:* if any person has, in point of property, a just demand upon the king, he must petition

[o] *Rex allegavit, quod ipse omnes libertates haberet in regno suo, quas imperator vindicabat in imperio.* (M. Paris, A.D. 1095).

[p] Finch. L. 83.

him in his court of chancery[5], where his chancellor will administer right as a matter of grace, though not upon compulsion[q]. And this is entirely consonant to what is laid down by the writers on natural law. "A subject," says Puffendorf[r], so long as he continues a subject, hath no way to *oblige* his prince to give him his due, when he refuses it, though no wise prince will ever refuse to stand to a lawful contract. And if the prince gives the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity, than upon the municipal laws." For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him. And, as to personal wrongs; it is well observed by Mr. Locke[s], "the harm which the sovereign can do in his own person not being likely to happen often, nor to extend itself far; nor being able, by his single strength, to subvert the laws, nor oppress the body of the people (should any prince have so much weakness and ill-nature as to endeavour to do it),—the inconveniency therefore of some particular mischiefs, that may happen sometimes, when a heady prince comes to the throne, are well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being thus set out of the reach of danger."

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for public oppression by punishment of ministers.

Next as to cases of ordinary *public oppression*, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For as a king cannot misuse his power, without the advice of evil counsellers, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the

[q] Finch. L. 255. See b. III. c. 17. [r] Law of N. and N. b. 8, c. 10. [s] On Gov. p. 2, § 205.

(5) See *Reeve* v. *Attorney-General*, 2 Atk. 223. The queen consort has also the same prerogative. (2 Roll. Ab. 213; Staunf. Prerog. 75. See also Mitf. Pl. 24). The rule in the text extends to an agent of the crown, whether contracting by deed or parol; he cannot be sued upon contracts made by him in that capacity, but the proper remedy is by petition of right to the crown (1 T. R. 172, 674). In the late case of the *Queen* v. *Lord Canterbury* (not yet reported), the liability of the crown to compensate for damage done to the property of a subject was much discussed.

land. But it is at the same time a maxim in those laws, that the king himself can do no wrong: since it would be a great weakness and absurdity in any system of positive law to define any possible wrong, without any possible redress.

For, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases, which the law will not, out of decency, suppose: being incapable of distrusting those, whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable [t]. For wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. If therefore (for example) the two houses of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned; and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of *law* therefore is, that neither the king nor either house of parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate remedy. For which reason all oppressions, [245] which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any *stated rule*, or *express legal* provision: but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

Indeed, it is found, by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides, and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally

[t] See these points more fully discussed in the *considerations of the law of forfeiture*, 3d edit. page 109—126, wherein the very learned author has thrown many new and important lights on the texture of our happy constitution.

established to preserve it. And therefore, though the positive laws are silent, experience will furnish us with a very remarkable case, wherein nature and reason prevailed. When king James the Second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown. And so far as this precedent leads, and no farther, we may now be allowed to lay down the *law* of redress against public oppression. If therefore any future prince should endeavour to subvert the constitution by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom; we are now authorized to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to say that any one, or two, of these ingredients would amount to such a situation; for there our precedent would fail us. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

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(2). Absolute perfection. The king can do no wrong.

II. Besides the *attribute* of sovereignty, the law also ascribes to the king, in his political capacity, absolute *perfection*. The king can do no wrong. Which ancient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people: for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice [u].

[u] Plowd. 487.

The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing: in him is no folly or weakness. And therefore if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in any wise prejudicial to the commonwealth, or a private person, the law will not suppose the king to have meant either an unwise or an injurious action, but declares that the king was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception either by or upon those agents whom the crown has thought proper to employ. For the law will not cast an imputation on that magistrate whom it intrusts with the executive power, as if he was capable of intentionally disregarding his trust: but attributes to mere imposition (to which the most perfect of sublunary beings must still continue liable) these little inadvertencies, which, if charged on the will of the prince, might lessen him in the eyes of his subjects.

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Yet still, notwithstanding this personal perfection which the law attributes to the sovereign, the constitution has allowed a latitude of supposing the contrary, in respect to both houses of parliament; each of which, in its turn, hath exerted the right of remonstrating and complaining to the king even of those acts of royalty, which are most properly and personally his own; such as messages signed by himself, and speeches delivered from the throne. And yet, such is the reverence which is paid to the royal person, that though the two houses have an undoubted right to consider these acts of state in any light whatever, and accordingly treat them in their addresses as personally proceeding from the prince, yet among themselves (to preserve the more perfect decency, and for the greater freedom of debate) they usually suppose them to flow from the advice of the administration. But the privilege of canvassing thus freely the personal acts of the sovereign (either directly, or even through the medium of his reputed advisers) belongs to no individual, but is confined to those august assemblies; and there too the objections must be proposed with the utmost respect and deference. One member was sent to the tower[w], for suggesting that his majesty's answer to the address of the commons contained "high words to fright the members out

But parliament may remonstrate.

[w] Com. Journ. 18 Nov. 1685.

of their duty;" and another[x], for saying that a part of the king's speech "seemed rather to be calculated for the meridian of Germany than Great Britain, and that the king was a stranger to our language and constitution."

No laches can be imputed to the king.

In farther pursuance of this principle, the law also determines that in the king can be no negligence, or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi*[6] has been the standing maxim upon all occasions: for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects[y]. In the king also can be no stain [248] or corruption of blood: for if the heir to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainder *ipso facto*[z]. And therefore when Hen. VII., who as earl of Richmond stood attainted, came to the crown, it was not thought necessary to pass an act of parliament to reverse this attainder; because, as lord Bacon in his history of that prince informs us, it was agreed that the assumption of the crown had at once purged all attainders. Neither can the king in judgment of law, as king, ever be a minor or under age; and therefore his royal grants and assents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one[a]. By a statute indeed, 28 Hen. VIII. c. 17, power was given to future kings to rescind and revoke all acts of parliament that

[x] Com. Journ. 4 Dec. 1717.
[y] Finch. L. 82; Co. Litt. 90.
[z] Finch. L. 82.
[a] Co. Litt. 43; 2 Inst. proëm. 3.

(6) This rule is subject to various exceptions both at common law and by statute. (See Thomas's Co. Lit. vol. i. p. 74, note 16). Thus after possession for fifty years, a grant from the crown may be presumed, unless a statute has prohibited such a grant. (*Goodtitle* v. *Baldwin*, 11 East, 488; Bac. Ab. Prerogative, E. 6; see 1 Jac. & W. 159, as to advowsons). In civil actions relating to landed property, by the 9 Geo. 3, c. 16, the king like a subject is limited to sixty years. (Vide infra, vol. iii. p. 307).

But in criminal prosecutions, as treasons, felonies, and misdemeanors, which are instituted in the name of the king, there is at common law no limitation. (3 Camp. 227; 7 East, 199). But by the 7 Wm. 3, c. 3, an indictment for treason, except for an attempt to assassinate the king, must be found within three years after the commission of the treasonable act. In like manner, the time for filing informations against persons unlawfully accepting and holding offices in corporations has been limited to six years by 32 Geo. 3, c. 58, and in some cases to twelve months. (See 7 Wm. 4, and 1 Vict. c. 78, s. 23).

should be made while they were under the age of twenty-four: but this was repealed by the statute 1 Edw. VI. c. 11, so far as related to that prince; and both statutes are declared to be determined by 24 Geo. II. c. 24. It hath also been usually thought prudent when the heir apparent has been very young, to appoint a protector, guardian, or regent, for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian [b].

[b] The methods of appointing this guardian or regent have been so various, and the duration of his power so uncertain, that from hence alone it may be collected that his office is unknown to the common law; and therefore (as sir Edward Coke says, 4 Inst. 58) the surest way is to have him made by authority of the great council in parliament. The earl of Pembroke, by his own authority, assumed in very troublesome times the regency of Henry III. who was then only nine years old; but was declared of full age by the pope at seventeen, confirmed the great charter at eighteen, and took upon him the administration of the government at twenty. A guardian and council of regency were named for Edward III. by the parliament, which deposed his father; the young king being then fifteen, and not assuming the government till three years after. When Richard II. succeeded at the age of eleven, the duke of Lancaster took upon him the management of the kingdom, till the parliament met, which appointed a nominal council to assist him. Henry V. on his death-bed named a regent and a guardian for his infant son Henry VI., then nine months old; but the parliament altered his disposition, and appointed a protector and council, with a special limited authority. Both these princes remained in a state of pupilage till the age of twenty-three. Edward V. at the age of thirteen was recommended by his father to the care of the duke of Gloucester; who was declared protector by the privy council. The statutes 25 Hen. VIII. c. 12, and 28 Hen. VIII. c. 7, provided, that the successor, if a male and under eighteen, or if a female and under sixteen, should be till such age in the government of his or her natural mother (if approved by the king), and such other counsellors as his majesty should by will or otherwise appoint: and he accordingly appointed his sixteen executors to have the government of his son Edward VI., and the kingdom, which executors elected the earl of Hertford protector. The statute 24 Geo. II. c. 24, in case the crown should descend to any of the children of Frederick late prince of Wales under the age of eighteen, appointed the princess dowager;—and that of 5 Geo. III. c. 27, in case of a like descent to any of his present majesty's children, empowers the king to name either the queen, the princess dowager, or any descendant of king Geo. II. residing in this kingdom;—to be guardian and regent, till the successor attains such age, assisted by a council of regency; the powers of them all being expressly defined and set down in the several acts 7.

(7) In continuation of this enumeration, it may be mentioned, that on the alienation of mind of Geo. 3, his son, the prince of Wales (afterwards Geo. 4), was declared regent by express act of Parliament (51 Geo. 3, c. 1), but

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(3). Perpetuity.

The king never dies.

III. A third *attribute* of the king's majesty is his *perpetuity*. The law ascribes to him, in his political capacity, an absolute immortality. The king never dies. Henry, Edward, or George may die; but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity by act of law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise*; *demissio regis, vel coronæ*; an expression which signifies merely a transfer of property; for as is observed in Plowden[c], when we say the demise of the crown, we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. Thus too, when Edward the Fourth, in the tenth year of his reign, was driven from his throne for a few months by the house of Lancaster, this temporary transfer of his dignity was denominated his *demise*; and all process was held to be discontinued, as upon a natural death of the king[d].

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II Of the royal authority and power.

We are next to consider those branches of the royal prerogative, which invest thus our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; in the exertion whereof consists the executive part of government. This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and

[c] Plowd. 177, 234.

[d] M. 49 Hen. VI. pl. 1—8.

with certain restrictions, which in the following year were removed by 52 Geo. 3, c. 8. (See the debates on these statutes, Parl. Deb. vols 18, 20, and on the Regency Bill of 1789, Parl. Hist. vol. 27). By the 1 Wm. 4, c. 2, the present duchess of Kent was appointed the guardian of her daughter (her present Majesty), until she attained the age of eighteen years; and it was also declared that the duchess should be the regent during the queen's minority; but her Majesty having attained the age of eighteen before the death of Wm. 4, no regency took place. (See also 1 & 2 Vict. c. 24). Lastly, by 3 & 4 Vict. c. 52, his Royal Highness Prince Albert has been appointed guardian of any issue of Queen Victoria becoming king or queen of these realms, and regent so long as such king or queen remains, under the age of eighteen years. (Vide supra, note (5), p. 224).

drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford. The king of England is therefore not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him: in like manner as, upon the great revolution of the Roman state, all the powers of the ancient magistracy of the commonwealth were concentrated in the new emperor: so that as Gravina[e] expresses it, "*in ejus unius persona veteris reipublicæ vis atque majestas per cumulatas magistratuum potestates exprimebatur.*"

In the exertion of lawful prerogative, the king is absolute.

After what has been premised in this chapter, I shall not (I trust) be considered as an advocate for arbitrary power, when I lay it down as a principle, that, in the exertion of lawful prerogative, the king is and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases: unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary: declaring, that thus far the prerogative shall go, and no farther. For otherwise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where its jurisdiction is clearly established and allowed, any man or body of men were permitted to disobey it, in the ordinary course of law: I say, in the *ordinary* course of law; for I do not now speak of those *extraordinary* recourses to first principles, which are [251] necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression. And yet the want of attending to this obvious distinction has occasioned these doctrines, of absolute power in the prince and of national resistance by the people, to be much misunderstood and perverted, by the advocates for slavery on the one hand, and the demagogues of faction on the other. The former observing the absolute sovereignty and transcendent dominion of the crown laid down (as it certainly is) most strongly and emphatically in our law books, as well as our homilies, have denied that any case can

[e] Orig. 1, § 103.

be excepted from so general and positive a rule, forgetting how impossible it is, in any practical system of laws, to point out beforehand those eccentrical remedies, which the sudden emergence of national distress may dictate, and which that alone can justify. On the other hand, over-zealous republicans, feeling the absurdity of unlimited passive obedience, have fancifully (or sometimes factiously) gone over to the other extreme: and, because resistance is justifiable to the person of the prince when the being of the state is endangered, and the public voice proclaims such resistance necessary, they have therefore allowed to every individual the right of determining this expedience, and of employing private force to resist even private oppression. A doctrine productive of anarchy, and (in consequence) equally fatal to civil liberty as tyranny itself. For civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society[8]: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.

In the exertion therefore of those prerogatives, which the law has given him, the king is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to
[252] a just and severe account. For prerogative consisting (as Mr. Locke[f] has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent; if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner. Thus the king may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet when such treaties have been judged pernicious, impeachments have pursued those ministers, by whose agency or advice they were concluded.

The prerogatives of the crown (in the sense under which we are now considering them) respect either this nation's intercourse with *foreign* nations, or its own *domestic* government and civil polity.

[f] On Gov. 2, § 166.

(8) Vide supra, pp. 125.

The royal authority and power in foreign affairs.

With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendour, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's concurrence, is the act only of private men. And so far is this point carried by our law, that it hath been held[8], that should all the subjects of England make war with a king in league with the king of England, without the royal assent, such war is no breach of the league. And, by the statute 2 Hen. V. c. 6, any subject committing acts of hostility upon any nation in league with the king was declared to be guilty of high treason: and though that act was repealed by statute 20 Hen. VI. c. 11, so far as relates to the making this offence high treason, yet still it remains a very great offence against the law of nations, and punishable by our laws, either capitally or otherwise, according to the circumstances of the case[9].

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(1). In sending and receiving ambassadors.

I. The king, therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. This may lead us into a short digression, by way of inquiry, how far the municipal laws of England intermeddle with or protect the rights of these messengers from one potentate to another, whom we call ambassadors.

Their privileges.

The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that

[8] 4 Inst. 152.

(9) Vide infra, vol. 4, pp. 69, 70.

state wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made: but an ambassador ought to be independent of every power, except that by which he is sent; and of consequence ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions. If he grossly offends, or makes an ill use of his character, he may be sent home and accused before his master [h], who is bound either to do justice upon him, or avow himself the accomplice of his crimes [i]. But there is great dispute among the writers on the laws of nations, whether this exemption of ambassadors extends to all crimes, as well natural as positive; or whether it only extends to such as are *mala prohibita*, as coining, and not to those that are *mala in se*, as murder [k]. Our law seems to have formerly taken in the restriction, as
[254] well as the general exemption. For it has been held, both by our common lawyers and civilians [l], that an ambassador is privileged by the law of nature and nations; and yet, if he commits any offence against the law of reason and nature, he shall lose his privilege [m]: and that therefore, if an ambassador conspires the death of the king in whose land he is, he may be condemned and executed for treason; but if he commits any other species of treason, it is otherwise, and he must be sent to his own kingdom [n]. And these positions seem to be built upon good appearance of reason. For since, as we have formerly shewn, all municipal laws act in subordination to the primary law of nature, and, where they annex a punishment to natural crimes, are only declaratory of and auxiliary to that law; therefore to this natural universal rule of justice ambassadors, as well as other men, are subject in all countries; and of consequence it is reasonable that, wherever they transgress it, they shall be liable to make atonement [o]. But, however these principles might formerly obtain, the general practice of this country, as well as of the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the pun-

[h] As was done with count Gyllenberg, the Swedish minister to Great Britain, A.D. 1716.

[i] Sp. L. 26, 21.

[k] Van Leeuwen in Ff. 50, 7, 17; Barbeyrac's Puff. l. 8, c. 9, § 9 & 17; Van Bynkershoek de foro legator. c. 17, 18, 19.

[l] 1 Roll. Rep. 175; 3 Bulstr. 27.

[m] 4 Inst. 153.

[n] 1 Roll. Rep. 185.

[o] Forster's Reports, 188.

ishment of a particular crime [p]. And therefore few, if any, examples have happened within a century past, where an ambassador has been punished for any offence, however atrocious in its nature [10].

In respect to *civil* suits, all the foreign jurists agree, that neither an ambassador, nor any of his train or *comites*, can be prosecuted for any debt or contract in the courts of that kingdom wherein he is sent to reside. Yet Sir Edward Coke maintains, that if an ambassador make a contract which is good, *jure gentium*, he shall answer for it here [q]. But the truth is, so few cases (if any) had arisen, wherein the privilege was either claimed or disputed, even with regard to civil suits, that our law-books are (in general) quite silent upon it previous to the reign of queen Anne; when an ambassador from Peter [255] the Great, czar of Muscovy, was actually arrested and taken out of his coach in London [r], for a debt of fifty pounds which he had there contracted. Instead of applying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the queen. The persons who were concerned in the arrest were examined before the privy council (of which the lord chief justice Holt was at the same time sworn a member [s]), and seventeen were committed to prison [t]; most of whom were prosecuted by information in the court of queen's bench, at the suit of the attorney general [u], and at their trial before the lord chief justice were convicted of the facts by the jury [w], reserving the question of law, how far those facts were criminal, to be afterwards argued before the judges; which question was never determined [11]. In the

[p] *Securitas legatorum utilitati, quæ ex pœna est, præponderat.* (*de jure b. & p.* l. 2, c. 18, § 4).

[q] 4 Inst. 153.

[r] 21 July 1708. Boyer's Annals of queen Anne.

[s] 25 July 1708. Boyer's Annals of queen Anne.

[t] 25, 29 July 1708. Ibid.

[u] 23 Oct. 1708. Ibid.

[w] 14 Feb. 1708. Ibid.

(10) Sed vide Vattel, b. 4, c. 7, s. 2. In the year 1654, Don Pataleonsa, brother of the Portuguese ambassador, and joined with him in the same commission, was tried, convicted, and executed for an atrocious murder. (1 Hale, P. C. 99; Foster, 188).

(11) In 3 Burr. 1480, Lord Mansfield says, that an infraction of the law of nations being only a misdemeanor was punishable at the discretion of the court at most only by fine, imprisonment, and the pillory; and, as the czar might have thought these punishments only a fresh insult, the offenders mentioned in the text were never brought up to receive judgment.

mean time the czar resented this affront very highly, and demanded that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death [x]. But the queen (to the amazement of that despotic court) directed her secretary to inform him, "that she could inflict no punishment upon any, the meanest, of her subjects, unless warranted by the law of the land; and therefore was persuaded that he would not insist upon impossibilities [y]." To satisfy however the clamours of the foreign ministers (who made it a common cause) as well as to appease the wrath of Peter, a bill was brought into parliament [z], and afterwards passed into a law [a], to prevent and punish such outrageous insolence for the future. And with a copy of this act, elegantly engrossed and illuminated, accompanied by a letter from the queen, an ambassador extraordinary [b] was commissioned to appear at Moscow [c], who declared, "that though her majesty could not inflict such a punishment as was required, because of the defect in that
[256] particular of the former established constitutions of her kingdom, yet with the unanimous consent of the parliament, she had caused a new act to be passed, to serve as a law for the future." This humiliating step was accepted as a full satisfaction by the czar: and the offenders, at his request, were discharged from all farther prosecution.

This statute [d] recites the arrest which had been made, "in contempt of the protection granted by her majesty, contrary to the law of nations, and in prejudice of the rights and privileges, which ambassadors and other public ministers have at all times been thereby possessed of, and ought to be kept sacred and inviolable:" wherefore it enacts, that for the future all process whereby the person of any ambassador, or of his domestic or domestic servant may be arrested, or his goods distrained or seized, shall be utterly null and void; and the persons prosecuting, soliciting, or executing such process, shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the lord chancellor and the two chief

[x] 17 Sept. 1708. Boyer's Annals of queen Anne.
[y] 11 Jan. 1708. Ibid. Mod. Un. Hist. xxxv. 454.
[z] Com. Journ. 23 Dec. 1708.
[a] 21 Apr. 1709. Boyer, ibid.
[b] Mr. Whitworth.
[c] 8 Jan. 1709. Boyer, ibid.
[d] 7 Ann. c. 12.

justices, or any of them, shall think fit[12]. But it is expressly provided, that no trader within the description of the bankrupt laws, who shall be in the service of any ambassador, shall be privileged or protected by this act; nor shall any one be punished for arresting an ambassador's servant, unless his name be registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex[13]. Exceptions that are strictly conformable to the rights of ambassadors[e], as observed in the most civilized countries. And, in consequence of this statute, thus declaring and enforcing the law of nations, these privileges are now held to be part of the law of the land, and are constantly allowed in the courts of common law[f 14]. [257]

II. It is also the king's prerogative to make treaties, leagues, (2). In making treaties and alliances.

[e] *Sæpe quæsitum est an comitum numero et jure habendi sunt, qui legatum comitantur, non ut instructior fiat legatio, sed unice ut lucro suo consulant, institores forte et mercatores. Et, quamvis hos sæpe defenderint et comitum loco habere voluerint legati, apparet tamen satis eo non pertinere, qui in legati legationisve officio non sunt. Quum autem ea res nonnonquam turbas dederit, optimo exemplo in quibusdam aulis olim receptum fuit, ut legatus teneretur exhibere nomenclaturam comitum suorum.* Van Bynkersh. c. 15, *prope finem.*

[f] Fitzg. 200; Stra. 797.

(12) Perhaps it was intended as a compliment to the czar, that the offenders against this act are deprived of the trial by jury; and as any corporal punishment may be inflicted that two of these three judges may think fit to award, the czar would be induced to believe that any future requisition of instant death would be complied with; but as the statute has not made the offence felony, of course, this punishment cannot extend to the privation of life.—[CHRISTIAN].

(13). Nor, to entitle them to the privilege, is it necessary, that their names should have been registered in the secretary of state's office, and transmitted to the sheriff's office; though unless they have been so registered and transmitted the sheriff or his officers cannot be proceeded against under the statute for the unlawful arrest. (1 Wils. 20; 4 Burr. 2017; 3 T. R. 79).

(14) A person claiming the protection of this statute must shew by affidavit that he was really and *bonâ fide* in the service of an ambassador at the time of the arrest, and that he was not a trader within the bankrupt laws (3 Burr. 1731, and 4 Burr. 2017; 2 Ld. Raym. 1524; 1 Wils. 78; 3 Campb. 47). It extends to British subjects as well as servants of foreigners (1 Bl. 471; S. C. 3 Burr. 1676; 7 Wils. 20); and to servants living out of the ambassador's house, as well as those under his roof. (Fitzgib. 200; 2 Str. 797; 3 Wils. 35). On the other hand it does not extend to consuls or their servants (3 M. & S. 284), nor does it protect the goods of an ambassador's servant from being distrained for poor-rates. (1 B. & C. 551).

and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power [g]; and then it is binding upon the whole community: and in England the sovereign power, *quoad hoc*, is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation [15].

(3). In making war and peace.

III. Upon the same principle the king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power [h]: and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war. Whatever hostilities therefore may be committed by private citizens, the state ought not to be affected thereby; unless that should justify their proceedings, and thereby become partner in the guilt. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers: according to that rule of the civil law [i]: *hostes hi sunt qui nobis, aut quibus nos, publice bellum decrevimus: cæteri latrones aut prædones sunt.* And the reason which
[258] is given by Grotius [j], why according to the law of nations a denunciation of war ought always to precede the actual com-

[g] Puff. L. of N. b. 8, c. 9, § 6
[h] Puff. b. 8, c. 6, § 8, and Barbeyr. in loc.
[i] Ff. 50. 16. 118.
[j] De jure b. & p. l. 3, c. 3, § 11.

(15) See Chitty's Com. Law, i. 38, 615; Com. Dig. Prerogative, b. 2, 3.

mencement of hostilities, is not so much that the enemy may be put upon his guard (which is matter rather of magnanimity than right), but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that in order to make a war completely effectual, it is necessary with us in England that it be publicly declared and duly proclaimed by the king's authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative [16].

(4). In issuing letters of marque and reprisals.

IV. But as the delay of making the war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subjects with powers to impel the prerogative; by directing the ministers of the crown to issue letters of marque and reprisal upon due demand: the prerogative of granting which is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters are grantable by the law of nations[k], whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisals (words used as synonymous; and signifying, the latter, a taking in return, the former, the passing the frontiers in order to such taking[l]) may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found. And indeed this custom of re- [259]

[k] De jure b. & p. l. 3, c. 2. § 4 & 5. [l] Dufresne, tit. Marca.

(16) See Chitty's Com. Law, i. 392, 414; Com. Dig. Prerogative, c. 1, 2, 3; Bac. Abr. Prerogative, D. 4.

prisal seems dictated by nature herself; for which reason we find in the most ancient times very notable instances of it [m]. But here the necessity is obvious of calling in the sovereign power, to determine when reprisals may be made; else every private sufferer would be a judge in his own cause. In pursuance of which principle, it is with us declared by the statute 4 Hen. V. c. 7, that if any subjects of the realm are oppressed in the time of truce by any foreigners, the king will grant marque in due form, to all that feel themselves grieved. Which form is thus directed to be observed: the sufferer must first apply to the lord privy-seal: and he shall make out letters of request under the privy-seal; and if, after such request of satisfaction made, the party required do not within a convenient time make due satisfaction or restitution to the party grieved, the lord chancellor shall make him out letters of marque under the great seal; and by virtue of these he may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate [17].

[m] See the account given by Nestor, in the eleventh book of the Iliad, of the reprisals made by himself on the Epeian nation; from whom he took a multitude of cattle, as a satisfaction for a prize won at the Elian games by his father Neleus, and for debts due to many private subjects of the Pylian kingdom, out of which booty the king took three hundred head of cattle for his own demand, and the rest were equitably divided among the other creditors.

(17) The granting of letters of marque under the statute of Henry 5, has long been discontinued, such letters being only grantable to persons actually aggrieved. If during a war, a subject, without any commission from the king, take an enemy's ship, the prize belongs not to the captor but to the king (Carth. 399), or the admiral as his grantee (2 Woodd. 433). In order, therefore, to encourage merchants and others to fit out armed ships in time of war, power has been given to the lord high admiral, or the commissioners of the admiralty by various statutes, (as by 29 Geo. 2, c. 34; 19 Geo. 3, c. 67) to grant commissions to private persons fitting out such ships, called privateers. Under these commissions all the prizes captured shall be divided according to the contract entered into between the owners and the master and crew of the privateer. But the owners, before such commissions are granted, are required to give security to the admiralty to make compensation for injuries committed against those powers with whom the nation is at peace (see 2 Vern. 592); and are also required to give security that such ships shall not be employed in smuggling (see 24 Geo. 3, c. 47). The king has the right of releasing any prize captured by such ships at any time previously to condemnation (11 East, 619). Letters of marque or general reprisals, as these commissions are called, are only valid during the war, and may be vacated either by express revocation, or by the misconduct of the parties, as for example, by their cruelty. (5 Rob. Rep. 9).

(5). In granting passports.

V. Upon exactly the same reason stands the prerogative of granting safe-conducts, without which, by the law of nations, no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves [n], that it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient; those being ever excepted who are driven on the coast by necessity, or by any cause that deserves pity or compassion. Great tenderness is shewn by our laws, not only to foreigners in distress (as will appear when we come to speak of shipwrecks), but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection; though liable to [260] be sent home whenever the king sees occasion. But no subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods and merchandize from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which by divers ancient statutes [o] must be granted by the king's seal and enrolled in chancery, or else are of no effect: the king being supposed the best judge of such emergencies, as may deserve exemption from the general law of arms. But passports under the king's sign-manual, or licenses from his ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity [18].

[n] Law of N. and N. b. 3, c. 3, § 9.
[o] 15 Hen. VI. c. 3; 18 Hen. VI. c. 8; 29 Hen. VI. c. 2.

(18) The residence of aliens in this country has been regulated by a series of temporary acts, commencing with 33 Geo. 3, c. 4, and ending with 6 & 7 Wm. 4, c. 11. The general intention of these enactments was to keep the government informed from time to time of the number, names, circumstances, and places of abode of resident foreigners, and also to arm the executive authorities with a discretionary power of summarily sending such foreigners out of the kingdom. But by the present Alien Act (6 & 7 Wm. 4, c. 11), it is enacted, that all masters of vessels arriving from foreign parts, shall report to the chief officer of the customs at the port of arrival the names of any aliens on board (sect. 1); that every alien shall after such arrival, present to such officer his passport, and make a declaration of his name and country (sect. 2); that a register shall be kept of these declarations, and a certificate of the registration given to the alien (sect. 4); and that, on leaving this country, this certificate shall be delivered up to the chief officer of

Indeed the law of England, as a commercial country, pays a very particular regard to foreign merchants, in innumerable instances. One I cannot omit to mention: that by *magna carta* [p] it is provided that all merchants (unless publicly prohibited beforehand) shall have safe-conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandize, without any unreasonable imposts, except in time of war: and if a war breaks out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours. This seems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook, [q] that it was a maxim among the Goths and Swedes, *quam legem exteri nobis posuere, eandem illis ponemus.* But it is somewhat extraordinary that it should have found a place in *magna carta*, a mere interior treaty between the king and his natural-born subjects: which occasions the learned Montesquieu to remark with a degree of admiration, "that the English have made
[261] the protection of *foreign* merchants one of the articles of their *national* liberty [r]." But indeed it well justifies another observation which he has made [s], "that the English know better than any other people upon earth, how to value at the same time these three great advantages, religion, liberty, and commerce." Very different from the genius of the Roman people; who in their manners, their constitution, and even in their laws, treated commerce as a dishonourable employment, and prohibited the exercise thereof to persons of birth, or rank, or fortune, [t]: and equally different from the bigotry of the canonists, who looked on trade as inconsistent with christianity [u], and determined at the council of Melfi, under

[p] c. 30.

[q] *De jure Sueon.* l. 3, c. 4.

[r] Sp. L. 20. 13.

[s] Ibid. 20. 6.

[t] *Nobiliores natalibus, et honorum luce conspicuos, et patrimonio ditiores, perniciosum urbibus mercimonium exercere prohibemus. C.* 4. 63. 3.

[u] *Homo mercator vix aut nunquam potest Deo placere; et ideo nullus christianus debet esse mercator; aut si voluerit esse, projiciatur de ecclesia Dei. Decret.* 1. 88. 11.

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the customs of the port of departure. (sect. 6). Even these easy regulations do not affect aliens who have been resident here three years, and who have obtained certificates of such residence. (sect. 11).

pope Urban II. A. D. 1090, that it was impossible with a safe conscience to exercise any traffic, or follow the profession of the law [w].

The royal authority and power in domestic affairs.

These are the principal prerogatives of the king respecting this nation's intercourse with *foreign* nations; in all of which he is considered as the delegate or representative of his people. But in *domestic* affairs he is considered in a great variety of characters, and from thence there arises an abundant number of other prerogatives.

(1). The king is a constituent part of the legislature.

I. First, he is a constituent part of the supreme legislative power; and, as such, has the prerogative of rejecting such provisions in parliament, as he judges improper to be passed. The expediency of which constitution has before been evinced at large [x]. I shall only farther remark, that the king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised ("any person or persons, bodies politic or corporate, &c.") affect not him in the least, if they may tend to restrain or diminish any of his rights or interests [y]. For it [262] would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject. Yet, where an act of parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the king as upon the subject [z]: and, likewise the king may take the benefit of any particular act, though he be not especially named [a].

(2). Is generalissimo in military and naval affairs.

II. The king is considered, in the next place, as the generalissimo, or the first in the military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community: and the principal use of government is to direct that united strength in the best and most effectual manner, to answer the end pro-

[w] *Falsa fit pœnitentia [laici] cum penitus ab officio curiali vel negotiali non recedit, quæ sine peccatis agi ulla ratione non prævalet. Act. Concil. apud Baron*, c. 16.

[x] Ch. 2, p. 154.

[y] 11 Rep. 74.

[z] Ibid. 71.

[a] 7 Rep. 32.

posed. Monarchical government is allowed to be the fittest of any for this purpose: it follows therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince.

In this capacity can raise and regulate fleets and armies;

In this capacity therefore, of general of the kingdom, the king has the sole power of raising and regulating fleets and armies. Of the manner in which they are raised and regulated I shall speak more, when I come to consider the military state. We are now only to consider the prerogative of enlisting and of governing them; which indeed was disputed and claimed, contrary to all reason and precedent, by the long parliament of king Charles I.; but, upon the restoration of his son, was solemnly declared by statute 13 Car. II. c. 6, to be in the king alone; for that the sole supreme government and command of the militia within all his majesty's realms and dominions, and of all forces by sea and land, and of all forts
[263] and places of strength, ever was and is the undoubted right of his majesty, and his royal predecessors, kings and queens of England; and that both or either house of parliament cannot, nor ought to, pretend to the same.

build forts;

This statute, it is obvious to observe, extends not only to fleets and armies, but also to forts and other places of strength, within the realm: the sole prerogative as well of erecting, as manning and governing of which belongs to the king in his capacity of general of the kingdom[b]: and all lands were formerly subject to a tax, for building of castles wherever the king thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore called by our Saxon ancestors the *trinoda necessitas: sc. pontis reparatio, arcis constructio, et expeditio contra hostem*[c]. And this they were called upon to do so often that, as sir Edward Coke from M. Paris assures us[d], there were in the time of Henry II. 1115 castles subsisting in England. The inconveniences of which, when granted out to private subjects, the lordly barons of those times, were severely felt by the whole kingdom; for, as William of Newburgh remarks in the reign of king Stephen, "*erant in Anglia quodammodo tot reges vel potius tyranni, quot domini castellorum*;" but it was felt by none more sensibly than by two

[b] 2 Inst. 30.
[c] Cowel's Interp. tit. castellorum operatio. Seld. Jan. Ang. 1, 42.
[d] 2 Inst. 31.

succeeding princes, king John and king Henry III. And therefore, the greatest part of them being demolished in the barons' wars, the kings of after times have been very cautious of suffering them to be rebuilt in a fortified manner: and sir Edward Coke lays it down[e], that no subject can build a castle, or house of strength, imbattled, or other fortress defensible, without the license of the king; for the danger which might ensue, if every man at his pleasure might do it.

appoint ports and havens;

It is partly upon the same, and partly upon a fiscal foundation, to secure his marine revenue, that the king has the prerogative of appointing *ports* and *havens*, or such places only for persons and merchandize to pass into and out of the realm, as he in his wisdom sees proper. By the feodal law all navigable rivers and havens were computed among the *regalia*[f], and were subject to the sovereign of the state. And in England it hath always been holden, that the king is lord of the whole shore[g], and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm[h]: and therefore, so early as the reign of king John, we find ships seized by the king's officers for putting in at a place that was not a legal port[i]. These legal ports were undoubtedly at first assigned by the crown; since to each of them a court of portmote is incident[k], the jurisdiction of which must flow from the royal authority: the *great ports* of the sea are also referred to, as well known and established by statute 4 Hen. IV. c. 20, which prohibits the landing elsewhere under pain of confiscation; and the statute 1 Eliz. c. 11, recites, that the franchise of lading and discharging had been frequently granted by the crown.

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assign wharfs and quays;

But though the king had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandize in any part of the haven; whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners. This occasioned the statutes of 1 Eliz. c. 11, and 13 & 14 Car. II. c. 11, s. 14, which enable the crown by commission to

[e] 1 Inst. 5.
[f] 2 Feud. t. 56; Crag. 1, 15, 15.
[g] F. N. B. 113.
[h] Dav. 9, 56.
[i] Madox. hist. exch. 530.
[k] 4 Inst. 148.

ascertain the limits of all ports, and to assign proper *wharfs* and *quays* in each port, for the exclusive landing and loading of merchandize[19].

erect beacons, light-houses, and sea-marks;

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The erection of beacons, light-houses, and sea-marks, is also a branch of the royal prerogative: whereof the first was anciently used in order to alarm the country, in case of the approach of an enemy; and all of them are signally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the king hath the exclusive power, by commission under his great seal[l], to cause them to be erected in fit and convenient places[m], as well upon the lands of the subject as upon the demesnes of the crown: which power is usually vested by letters patent in the office of lord high admiral[n]. And by statute 8 Eliz. c. 13, the corporation of the Trinity-house are empowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any steeple, tree, or other known sea-mark, he shall forfeit 100*l.* or in case of inability to pay it, shall be *ipso facto* outlawed[20].

prohibit the exportation of arms and ammunition;

To this branch of the prerogative may also be referred the power vested in his majesty, by statutes 12 Car. II. c. 4, and 29 Geo. II. c. 16, of prohibiting the exportation of arms or ammunition out of this kingdom under severe penalties[21]: and

[l] 3 Inst. 204; 4 Inst. 148.
[m] Rot. Claus. 1 Ric. II. m. 42; Pryn. on 4 Inst. 136.
[n] Sid. 158; 4 Inst. 149.

(19) By 46 Geo. 3, c. 153, no pier, quay, wharf, jetty, breast, or embankment, shall be erected in or near to any public harbour, so far as the tide flows up the same, without giving one month's notice to the secretary of the Admiralty, under a penalty of 200*l.*, to be recovered by action or information; saving, however, the rights and privileges of the city of London, and of the lord mayor as conservator of the Thames and Medway.

(20) The erection and preservation of light-houses, &c. are now provided for by 6 & 7 Wm. 4, c. 79.

(21) By 59 Geo. 3, c. 69, any British subject enlisting and serving in any foreign service, military or naval, except by royal license, is liable to punishment by fine and imprisonment. By 3 & 4 Wm. 4, c. 52, sect. 58, the importation of arms, ammunition, and utensils of war, by way of merchandize, except by royal license and for furnishing the public stores only, is absolutely prohibited; and by sect. 104 of the same statute, the exportation of arms, ammunition, gunpowder, and military and naval stores, and any article (except copper) convertible into military or naval stores may be at any time prohibited by proclamation or order in council. Sed vide 5 & 6 Vict c. 47.

likewise the right which the king has, whenever he sees proper, of confining his subjects to stay within the realm, or of recalling them when beyond the seas. By the common law [o], every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave; provided he is under no injunction of staying at home (which liberty was expressly declared in king John's great charter, though left out in that of Henry III.); but, because that every man ought of right to defend the king and his realm, therefore the king at his pleasure may command him by his writ that he go not beyond the seas, or out of the realm, without license; and, if, he do the contrary, he shall be punished for disobeying the king's command. Some persons there anciently were, that, by reason of their stations, were under a perpetual prohibition of going abroad without license obtained; among which were reckoned all peers, on account of their being counsellors of the crown; all knights, who were bound to defend the kingdom from invasions; all ecclesiastics, who were expressly confined by the fourth chapter of the constitutions of Clarendon, on account of their attachment in the times of popery to the see of Rome; all archers and other artificers, lest they should instruct foreigners to rival us in their several trades and manufactures. This was law in the times of Britton [p], who wrote in the reign of Edward I.: and sir Edward Coke [q] gives us many instances to this effect in the time of Edward III. In the succeeding reign the affair of travelling wore a very different aspect; an act of parliament being made [r], forbidding all persons whatever to go abroad without license; except only the lords and other great men of the realm; and true and notable merchants; and the king's soldiers. But this act was repealed by the statute 4 Jac. I. c. 1. And at present every body has, or at least assumes, the liberty of going abroad when he pleases. Yet undoubtedly if the king, by the writ of *ne exeat regnum* [22], under his great seal or privy seal, thinks proper to

and prevent subjects from leaving or remaining out of the kingdom.

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[o] F. N. B. 85.
[p] c. 123.
[q] 3 Inst. 179.
[r] 5 Ric. II. st. 1, c. 2.

(22) At first this writ was employed to hinder the clergy from going to Rome; it was afterwards extended to laymen machinating and concerting measures against the state; and has at length been applied to prevent a subterfuge from the justice of the nation, though in matters of private concern-

prohibit him from so doing; or if the king sends a writ to any man, when abroad, commanding his return [23], and in either case the subject disobeys; it is a high contempt of the king's prerogative, for which the offender's lands shall be seized till he return; and then he is liable to fine and imprisonment [s].

(s). Is the fountain of justice.

III. Another capacity, in which the king is considered in domestic affairs, is as the *fountain of justice* and general conservator of the peace of the kingdom. By the fountain of justice the law does not mean the *author* or *original*, but only the *distributor*. Justice is not derived from the king, as from his *free gift*; but he is the steward of the public, to dispense it to whom it is *due* [t]. He is not the spring, but the reservoir; from whence right and equity are conducted, by a thousand channels, to every individual. The original power of judicature, by the fundamental principles of society, is
[267] lodged in the society at large: but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the king or his substitutes. He therefore has alone the right of erecting courts of judicature: for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this

[s] 1 Hawk. P. C. 22.

[t] *Ad hoc autem creatus est et electus, ut justitiam faciat universis.* Bract. l. 3, tr. 1, c. 9.

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ment. It is now issuable from the court of chancery, in order to get bail for any certain, equitable and money debt, due to a person within the jurisdiction and entitled to sue the debtor for such demand, and it is granted upon affidavit of the debtor's intention to go abroad. The legality of this application of the writ was settled in Charles the Second's time, upon an usage first began in the reign of James I; and was afterwards so fully established, that the granting of it has been considered a matter of right; but it is never granted without great consideration, particularly against foreigners, who are liable to this writ, unless in their own country they were not liable to be arrested. (See Maddock's Ch. Pr. ii. 279, and Beames on Ne Exeat Regno).

(23) The exercise of this prerogative has been long disused, and it is improbable that it will ever be resumed. For the ancient learning upon it, see 3 Inst. 84.

great and extensive trust: it is consequently necessary, that courts should be erected, to assist him in executing this power; and equally necessary, that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers [24].

In this capacity appoints the judges;

It is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party [25]. But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by act of parliament [u]. And, in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 W. III. c. 2, that their commissions shall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And now, by the noble improvements of that law in the statute of 1 Geo. III. c. 23, enacted at the earnest recommendation of the king himself from the throne, the judges are [268] continued in their offices during their good behaviour, notwithstanding any demise of the crown (which was formerly held [w] immediately to vacate their seats), and their full salaries are absolutely secured to them during the continuance of their commissions; his majesty having been pleased to declare, that "he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of

[u] 2 Hawk. P. C. 2.

[w] 2 Lord Raym. 747.

(24) But the courts erected by the king can only proceed according to the course of the common law. The king can erect no court of chancery or conscience; which can only be erected by act of parliament, of which many instances have recently occurred. (Com. Dig. Prerogative, D. 28).

(25) See vol. iii. p. 41.

his subjects; and as most conducive to the honour of the crown [x] [26]."

is the public prosecutor in criminal matters;

In criminal proceedings, or prosecutions for offences, it would still be a higher absurdity, if the king personally sate in judgment; because in regard to these he appears in another capacity, that of *prosecutor*. All offences are either against the king's peace, or his crown and dignity: and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason, and a very few others) to be rather offences against the kingdom than the king; yet, as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And this notion was carried so far in the old Gothic constitution (wherein the king was bound by his coronation oath to conserve the peace), that in case of any forcible injury offered to the person of a fellow-subject, the offender was accused of a kind of perjury, in having violated the king's coronation oath; *dicebatur fregisse juramentum regis juratum* [y]. And hence also arises another branch of the prerogative, that of *pardoning* offences; for it is reasonable that he only who is injured should have the power of forgiving [27]. Of

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can pardon offences;

[x] Com. Journ. 3 Mar. 1761.

[y] Stiernh. de jure Goth. l. 3, c. 3. A notion somewhat similar to this may be found in the Mirror, c. 1, § 5. And so also, when the chief justice Thorpe was condemned to be hanged for bribery, he was said *sacramentum domini regis fregisse*. Rot. Parl. 25 Edw. III.

(26) The learned commentator considerably exaggerates the "noble improvement" in the law effected by 1 Geo. 3, c. 23. "The independence of the judges," says Mr. Hallam, "we owe to the act of settlement, not, as ignorance and adulation have perpetually asserted, to Geo. 3." (Const. Hist. iii. 262).

(27) That the prerogative of mercy should be lodged in the crown does not seem to be owing to the legal fiction that the king is the injured party, but rather to the necessity of placing the power of forgiveness where it may be most promptly and judiciously exercised. The legislature from its constitution would be difficult of access, while the judicature, having tried the offender, could not, without manifest absurdity, ever wholly forgive him. The executive has, therefore, in all countries naturally and necessarily been invested with this prerogative. (See 3 Inst. 233; Shower, 1. 284; Lord Raym. 214; 2 T. R. 569).

prosecutions and pardons I shall treat more at large hereafter; and only mention them here, in this cursory manner, to shew the constitutional grounds of this power of the crown, and how regularly connected all the links are in this vast chain of prerogative.

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removeable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. For which reason, by the statute of 16 Car. I. c. 10, which abolished the court of star-chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state. And, indeed, that the absolute power, claimed and exercised in a neighbouring nation, is more tolerable than that of the eastern empires, is in great measure owing to their having vested the judicial power in their parliaments, a body separate and distinct from both the legislative and executive: and, if ever that nation recovers its former liberty, it will owe it to the efforts of those assemblies. In Turkey, where every thing is centered in the sultan or his ministers, despotic power is in its meridian, and wears a more dreadful aspect. [270]

A consequence of this prerogative is the legal *ubiquity* of the king. His majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice[z]. His judges are the mirror by which the

in law is always present in court;

[z] Fortesc. c. 8; 2 Inst. 186.

king's image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions, or pronounce judgment, for the benefit and protection of the subject. And from this ubiquity it follows, that the king can never be nonsuit [a]; for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court [28]. For the same reason also, in the forms of legal proceedings, the king is not said to appear *by his attorney*, as other men do; for in contemplation of law he is always present in court [b].

and can issue proclamations for enforcing laws.

From the same original, of the king's being the fountain of justice, we may also deduce the prerogative of issuing proclamations, which is vested in the king alone. These proclamations have then a binding force, when (as sir Edward Coke observes [c]) they are grounded upon and enforce the laws of the realm. For though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary. Thus the established law is, that the king may prohibit any of his subjects from leaving the realm: a proclamation therefore forbidding this in general for three weeks,
[271] by laying an embargo upon all shipping in time of war [d], will be equally binding as an act of parliament, because founded upon a prior law. But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat (though in the time of a public scarcity) being contrary to law, and particularly to statute 22 Car. II. c. 13, the advisers of such a proclamation, and all persons acting under it, found it necessary to be indemnified by a special act of parliament,

[a] Co. Litt. 139.
[b] Finch. L. 81.
[c] 3 Inst. 162.
[d] 4 Mod. 177, 179.

(28) But the attorney-general may enter a *non vult prosequi*, which has the effect of a nonsuit. (Co. Lit. 139).

7 Geo. III. c. 7. A proclamation for disarming papists is also binding, being only in execution of what the legislature has first ordained: but a proclamation for allowing arms to papists, or for disarming any protestant subjects, will not bind; because the first would be to assume a dispensing power, the latter a legislative one; to the vesting of either of which in any single person the laws of England are absolutely strangers. Indeed by the statute 31 Hen. VIII. c. 8, it was enacted, that the king's proclamation should have the force of acts of parliament [29]; a statute, which was calculated to introduce the most despotic tryanny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after [e].

(4). Is the fountain of honour, office, and privilege.

IV. The king is likewise the *fountain of honour, of office,* and *of privilege:* and this in a different sense from that wherein he is styled the fountain of justice: for here he is really the parent of them. It is impossible that government can be maintained without a due subordination of rank; that the people may know and distinguish such as are set over them, in order to yield them their due respect and obedience; and also that the officers themselves, being encouraged by emulation and the hopes of superiority, may the better discharge their functions: and the law supposes that no one can be so good a judge of their several merits and services, as the king himself who employs them. It has therefore intrusted him with the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them. And therefore all degrees of nobility, of [272] knighthood, and other titles, are received by immediate grant from the crown: either expressed in writing, by writs

[e] Stat. 1 Edw. VI. c. 12.

(29) But with a proviso, that such proclamations should not be prejudicial to any person's inheritance, offices, liberties, goods, and chattels, or infringe the established laws. The utmost penalty to be inflicted upon infringers of these proclamations was fine and imprisonment, unless the proclamation concerned "any kind of heresies against Christian doctrine" which might be punished with death; an exception which gives a clue to the origin of the act. It was upon this act that all the great changes in the national religion made during the minority of Edw. 6, were grounded. (Burnet. Ref. i. 528).

or letters patent, as in the creation of peers and baronets; or by corporeal investiture, as in the creation of a simple knight.

In this capacity can erect and bestow honours and offices;

From the same principle also arises the prerogative of erecting and disposing of offices: for honours and offices are in their nature convertible and synoymous. All offices under the crown carry in the eye of the law an honour along with them; because they imply a superiority of parts and abilities, being supposed to be always filled with those that are most able to execute them. And, on the other hand, all honours in their original had duties or offices annexed to them: an earl, *comes*, was the conservator or governor of a county; and a knight, *miles*, was bound to attend the king in his wars. For the same reason therefore that honours are in the disposal of the king, offices ought to be so likewise; and as the king may create new titles, so may he create new offices: but with this restriction, that he cannot create new offices, with new fees annexed to them, nor annex new fees to old offices; for this would be a tax upon the subject, which cannot be imposed but by act of parliament[f]. Wherefore, in 13 Hen. IV., a new office being created by the king's letters patent for measuring cloths, with a new fee for the same, the letters patent were, on account of the new fee, revoked and declared void in parliament.

grant precedence, make denizens, and erect corporations.

Upon the same, or a like reason, the king has also the prerogative of conferring privileges upon private persons. Such as granting place or precedence to any of his subjects[30], as shall seem good to his royal wisdom[g]: or such as converting aliens, or persons born out of the king's dominions, into deni-

[f] 2 Inst. 533.

[g] 4 Inst. 361.

(30) The king by the common law could have created a duke, earl, &c. and could have given him precedence before all others of the same rank, a prerogative not unfrequently exercised in ancient times; but it was restrained by the 31 Hen. 8, c. 10, which settles the place or precedence of all the nobility and great officers of state. This prerogative of the crown was unrestrained in Ireland; but by the fourth article of the Union with Ireland this statute, 31 Hen. 8, is extended to all peers of Ireland, or at least, to all peers of the United Kingdom, created after the Union, if not to all the pre-existing peers of Ireland. (Vide supra, p. 100, n. 12, art. 4).—This prerogative her present Majesty was lately pleased to exercise, by ordaining that His Royal Highness Prince Albert, should, except where otherwise provided by act of Parliament, have place, pre-eminence, and precedence next to her Majesty. (Gaz. March 5, 1840; see also Parl. Deb. li. pp. 575, 923, 1079).

zens; whereby some very considerable privileges of natural-born subjects are conferred upon them. Such also is the prerogative of erecting corporations; whereby a number of private persons are united and knit together, and enjoy many liberties, powers, and immunities in their political capacity, which they were utterly incapable of in their natural. Of [273] aliens, denizens, natural-born, and naturalized subjects, I shall speak more largely in a subsequent chapter; as also of corporations at the close of this book of our commentaries. I now only mention them incidentally, in order to remark the king's prerogative of making them; which is grounded upon this foundation, that the king, having the sole administration of the government in his hands, is the best and only judge, in what capacities, with what privileges, and under what distinctions, his people are best qualified to serve, and to act under him. A principle, which was carried so far by the imperial law, that it was determined to be the crime of sacrilege, even to doubt whether the prince had appointed proper officers in the state[h].

(5). Is the arbiter of commerce.

V. Another light, in which the laws of England considered the king with regard to domestic concerns, is as the *arbiter of commerce*. By commerce, I at present mean domestic commerce only. It would lead me into too large a field, if I were to attempt to enter upon the nature of foreign trade, its privileges, regulations, and restrictions; and would also be quite beside the purpose of these commentaries, which are confined to the laws of England: whereas no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandize; neither can they have a proper authority for this purpose. For, as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of. And in particular it is held to be part of the law of England, which decides the cause of merchants by the general rules which obtain in all commercial countries; and that often even in matters relating to domestic trade, as for instance with regard to the

[h] *Disputare de principali judicio non oportet; sacrilegii enim instar est, dubitare an is dignus sit, quem elegerit imperator.* C. 9, 29. 3.

drawing, the acceptance, and transfer of inland bills of exchange[i].

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With us in England, the king's prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles:

In this capacity may establish public markets and fairs;

First, the establishment of *public marts*, or places of buying and selling; such as markets and fairs, with the tolls thereunto belonging. These can only be set up by virtue of the king's grant, or by long and immemorial usage and prescription, which presupposes such a grant[k]. The limitation of these public resorts, to such time and such place as may be most convenient for the neighbourhood, forms a part of œconomics, or domestic polity; which considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases.

regulate weights and measures;

Secondly, the regulation of weights and measures. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But, as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard: which standard it is impossible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot rule, or a pound weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which, all weights and measures may be reduced to one uniform size: and the prerogative of fixing this standard our ancient law vested in the crown, as in Normandy it belonged to the duke[l]. This standard was originally kept at Winchester: and we find in the laws of king Edgar[m], near a century before the Conquest, an injunction that the one measure, which was kept at Winchester, should be observed throughout the realm. Most nations have regulated the

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standard of measures of length by comparison with the parts of the human body; as the palm, the hand, the span, the foot, the cubit, the ell, (*ulna*, or arm), the pace, and the fathom. But as these are of different dimensions in men of different

[i] Co. Litt. 172; Ld. Raym. 181, 1542.

[k] 2 Inst. 220

[l] Gr. Coustum. c. 16.

[m] cap. 8.

proportions, our ancient historians[n] inform us, that a new standard of longitudinal measure was ascertained by king Henry the First; who commanded that the *ulna* or ancient ell, which answers to the modern yard, should be made of the exact length of his own arm. And, one standard of measures of length being gained, all others are easily derived from thence; those of greater length by multiplying, those of less by subdividing, that original standard. Thus, by the statute called *compositio ulnarum et perticarum*, five yards and a half make a perch; and the yard is subdivided into three feet, and each foot into twelve inches: which inches will be each of the length of three grains of barley. Superficial measures are derived by squaring those of length; and measures of capacity by cubing them. The standard of weights was originally taken from corns of wheat, whence the lowest denomination of weights we have is still called a grain; thirty-two of which are directed, by the statute called *compositio mensurarum*, to compose a pennyweight, whereof twenty make an ounce, twelve ounces a pound, and so upwards. And upon these principles the first standards were made; which, being originally so fixed by the crown, their subsequent regulations have been generally made by the king in parliament. Thus, under king Richard I., in his parliament holden at Westminster, *A. D.* 1197, it was ordained that there should be only one weight and one measure throughout the kingdom, and that the custody of the assize or standard of weights and measures should be committed to certain persons in every city and borough[o]; from whence the ancient office of the king's aulnager seems to have been derived, whose duty it was, for a certain fee, to measure all cloths made for sale, till the office was abolished by the statute 11 & 12 Wm. III. c. 20. In king John's time this ordinance of king Richard was frequently dispensed with for money[p]: which occasioned a provision to be made for enforcing it, in the great charters of king John and his son[q]. These original standards were called *pondus regis*[r], and *mensura domini regis*[s]; and are directed by a variety of subsequent statutes to be kept in the exchequer, and all weights and

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[n] Will. Malmsb. in vita Hen. I.; Spelm. Hen. I. apud Wilkins, 299.
[o] Hoved. Matth. Paris.
[p] Hoved. A.D. 1201.
[q] 9 Hen. III. c. 25.
[r] Plac. 35 Edw. I. apud Cowel's Interp. tit. pondus regis.
[s] Flet. 2, 12.

measures to be made conformable thereto[t]. But, as sir Edward Coke observes[u], though this hath so often by authority of parliament been enacted, yet it could never be effected; so forcible is custom with the multitude[31].

and give currency to coin.

Thirdly, as money is the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority, or make it current. Money is an universal medium, or common standard, by comparison with which the value of all merchandize may be ascertained: or it is a sign, which represents the respective values of all commodities. Metals are well calculated for this sign, because they are durable, and are capable of many subdivisions; and a precious metal is still better calculated for this purpose, because it is

[t] 14 Edw. III. st. 1, c. 12; 25 Edw. III. st. 5, c. 9 & 10; 16 Rich. II. c. 3; 8 Hen. VI. c. 5; 11 Hen. VI. c. 8; 11 Hen. VII. c. 4; 22 Car. II. c. 8.

[u] 2 Inst. 41.

(31) See 2 Chitty's Com. Law, 168, and the general act 5 Geo. 4, c. 74. The regulation of weights and measures has, from magna charta downwards, frequently occupied the attention of parliament, and cannot now without evident impropriety be referred simply to the king's prerogative. Upwards of twenty statutes, some imposing loss of property, and penalties have been passed to establish an uniformity of weights and measures throughout the kingdom; and a custom or usage countervailing these statutes is void in law. On these customs, see 3 T. R. 271; 4 T. R. 314, 150; 5 T. R. 353; 6 T. R. 338; 4 Taunt. 102.

The Winchester standard mentioned in the text, was adopted and regulated by many statutes from 14 Edw. 3, st. 1, cc. 12, 21, to 43 Geo. 3, c. 69, but these were all repealed by 5 Geo. 4, c. 74, by which and other statutes (6 Geo. 4, c. 12; 4 & 5 Wm. 4, c. 49, and 5 & 6 Wm. 4, c. 63), which were afterwards passed, the imperial standard yard, pound, gallon, and bushel, were fixed and rendered uniform throughout the United Kingdom. All articles sold by weight must be sold by avoirdupois weight, except gold, silver, platina, diamonds, or other precious stones, which may be sold by troy weight; also, except drugs, which may be sold by apothecaries' weight, if sold by retail. Models and copies of these standard weights and measures and their parts were deposited at the chamberlain's office, Westminster, and sent to London, Dublin, and other places. The magistrates were also directed to procure them for the use of their respective counties; and since the 1st of January, 1826, the construction of all contracts have been governed by these standards, except when express agreements have been made to the contrary; and in those cases the proportion of the local or special measure to the standard must be specified in such agreement, otherwise the agreement is null and void. By the last act, 5 & 6 Wm. 4, c. 63, weights and measures verified and stamped at the exchequer at Westminster are declared legal, although not similar in shape to those required (sect. 4), and all local and customary measures and also heaped measures are abolished (sects. 6 & 7).

the most portable. A metal is also the most proper for a common measure, because it can easily be reduced to the same standard in all nations: and every particular nation fixes on it its own impression, that the weight and standard (wherein consists the intrinsic value) may both be known by inspection only.

As the quantity of precious metals increases, that is, the more of them there is extracted from the mine, this universal medium or common sign will sink in value, and grow less precious. Above a thousand millions of bullion are calculated to have been imported into Europe from America within less than three centuries: and the quantity is daily increasing. The consequence is, that more money must be given now for the same commodity than was given an hundred years ago. [277] And, if any accident were to diminish the quantity of gold and silver, their value would proportionably rise. A horse that was formerly worth ten pounds, is now perhaps worth twenty: and by any failure of current specie, the price may be reduced to what it was. Yet is the horse in reality neither dearer or cheaper at one time than another: for, if the metal which constitutes the coin was formerly twice as scarce as at present, the commodity was then as dear at half the price as now it is at the whole.

The coining of money is in all states the act of the sovereign power; for the reason just mentioned, that its value may be known on inspection. And with respect to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination.

With regard to the materials, sir Edward Coke lays it down[v], that the money of England must either be of gold or silver: and none other was ever issued by the royal authority till 1672, when copper farthings and halfpence were coined by king Charles the Second, and ordered by proclamation to be current in all payments, under the value of sixpence, and not otherwise. But this copper coin is not upon the same footing with the other in many respects, particularly with regard to the offence of counterfeiting it[32]. And,

[v] 2 Inst. 577.

(32) See the act for consolidating and amending the laws against offences relating to the coin, 2 & 3 Wm. 4, c. 34; and 43 Geo. 3, c. 139, for preventing the counterfeiting foreign copper coin. (Infra, vol. iv. pp. 98—100).

as to the silver coin, it is enacted by statute 14 Geo. III. c. 42, that no tender of payment in silver money, exceeding twenty-five pounds at one time, shall be a sufficient tender in law, for more than its value by weight, at the rate of 5*s*. 2*d*. an ounce [33].

As to the impression, the stamping thereof is the unquestionable prerogative of the crown: for though divers bishops and monasteries had formerly the privilege of coining money, yet, as sir Matthew Hale observes [w], this was usually done by special grant from the king, or by prescription which
[278] supposes one: and therefore was derived from, and not in derogation of, the royal prerogative. Besides that they had only the profit of the coinage, and not the power of instituting either the impression or denomination; but had usually the stamp sent them from the exchequer.

The denomination, or value for which the coin is to pass current, is likewise in the breast of the king; and, if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard [x] and called esterling

[w] 1 Hist. P. C. 191.

[x] This standard hath been frequently varied in former times; but hath for many years past been thus invariably settled. The pound troy of gold, consisting of twenty-two carats (or twenty-fourth-parts) fine, and two of alloy, is divided into forty-four guineas and an half of the present value of 21*s*. each. And the pound troy of silver, consisting of eleven ounces and two penny-weights pure, and eighteen penny-weights alloy, is divided into sixty-two shillings. (See Folkes on English coins [34]).

(33) The statutes in force relating to the current coin of the realm are, 9 Wm. 3, c. 2, for preventing the currency of hammered silver coin; 14 Geo. 3, c. 92, amended by 18 Geo. 3, c. 30, for regulating and ascertaining the weights to be made use of in weighing gold and silver coin; and the 56 Geo. 3, c. 68, regulating the currency of gold and silver coin of the realm, which (sect. 12) repeals 14 Geo. 3, c. 42, and enacts, that after a day to be named in the king's proclamation, no tender of silver money for a debt or sum exceeding forty shillings shall be legal. Bank of England notes are legal tender for all sums above 5*l*., but these notes are payable in cash on demand. (See 3 & 4 Wm. 4, c. 98, s. 6). By the 38 Geo. 3, c. 67, the exportation of base copper coin to the colonies is prohibited.

(34) But since 1816, the pound troy of standard gold has been coined into $46\frac{8}{11}\frac{0}{9}$ sovereigns, or 46*l*. 14*s*. 6*d*. And since the same date the pound troy of silver has been coined into sixty-six shillings. (M'Culloch's Dict. Com *sub voce*, Coins).

or sterling metal; a name for which there are various reasons given [y], but none of them entirely satisfactory. And of this sterling or esterling metal all the coin of the kingdom must be made, by the statute 25 Edw. III. c. 13. So that the king's prerogative seemeth not to extend to the debasing or enhancing the value of the coin below or above the sterling value [z]: though sir Matthew Hale [a] appears to be of another opinion. The king may also, by his proclamation legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments [b]. But this, I apprehend, ought to be by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary. There is at present no such legitimated money; Portugal coin being only current by private consent, so that any one who pleases may refuse to take it in payment. The king [279] may also at any time decry, or cry down, any coin of the kingdom, and make it no longer current [c 35].

V. The king, is lastly, considered by the laws of England as the head and supreme governor of the national church. V. Is head of the church.

To enter into the reasons upon which this prerogative is founded, is matter rather of divinity than of law. I shall therefore only observe that by statute 26 Hen. VIII. c. 1, (reciting that the king's majesty justly and rightfully is and ought to be the supreme head of the church of England; and so had been recognised by the clergy of this kingdom in their convocation) it is enacted, that the king shall be reputed the only supreme head of the church of England, and shall have annexed to the imperial crown of this realm, as well the title and style thereof, as all jurisdictions, authorites, and commodities, to the said dignity of supreme head of the church

[y] Spelm. Gloss. 203; Dufresne, III. 165. The most plausible opinion seems to be that adopted by those two etymologists, that the name was derived from the *Esterlingi*, or Esterlings; as those Saxons were anciently called, who inhabited that district of Germany now occupied by the Hanse-towns and their appendages; the earliest traders in modern Europe. (See Camden's Scotland, p. 11; Davies's Rep. 48).

[z] 2 Inst. 577.

[a] 1 Hal. P. C. 194.

[b] Ibid. 197.

[c] 1 Hal. P. C. 197.

(35) By 2 & 3 Wm. 4, c. 34, s. 13, any gold or silver coin suspected to be diminished or counterfeit, may be cut, broken, or defaced by the person to whom it is tendered.

appertaining. And another statute to the same purport was made, 1 Eliz. c. 1.

The convocations.

In virtue of this authority the king convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods or convocations. This was an inherent prerogative of the crown, long before the time of Henry VIII. as appears by the statute 8 Hen. VI. c. 1, and the many authors, both lawyers and historians, vouched by sir Edward Coke [d]. So that the statute 25 Hen. VIII. c. 19, which restrains the convocation from making or putting in execution any canons repugnant to the king's prerogative, or the laws, customs, and statutes of the realm, was merely declaratory of the old common law [e]: that part of it only being new, which makes the king's royal assent actually necessary to the validity of every canon. The convocation [36] or ecclesiastical synod in England, differs considerably in its constitution from the synods of other christian kingdoms: those consisting wholly of bishops; whereas with us the convocation is the miniature of a parliament, wherein

[d] 4 Inst. 322, 323.

[e] 12 Rep. 72.

(36) There is a separate convocation for the provinces of York and Canterbury respectively. For the mode of summoning these convocations, their legal powers, authority, and a legal view of the chief points in their history of convocations, the student is referred to Rogers's Ecclesiastical Law, Art. Convocation.

In the year 1701, the lower house of convocation pretended to a right of adjourning to a different day from that fixed by the upper, and consequently of holding separate sessions, but although these and other unprecedented claims to independence, were checked by a prorogation, yet in the succeeding reign the lower house again distinguished itself by the most factious spirit, and especially by insolence towards the bishops. They soon, however, excited a flame which consumed themselves. Hoadly, bishop of Bangor, had preached a sermon abounding with those principles concerning religious liberty, of which he had long been the courageous and powerful asserter. The lower house thought fit to denounce, what they called the dangerous tenets of this discourse and of a work not long before published by the same prelate. A long and celebrated war of pens instantly commenced, known by the name of the Bangorian Controversy. But as the principles of Hoadly and his advocates appeared in the main, little else than those of Protestantism and toleration, the sentence of the laity, in the temper that was then gaining ground as to ecclesiastical subjects, was soon pronounced in their favour, and the high church party discredited themselves by an opposition to what now pass for the incontrovertible truisms of religious liberty. In the ferment of that age, it was expedient for the state to scatter a little dust over these angry insects; the convocation was accordingly prorogued in 1717, and has never again sat for any business. (Hallam. Con. Hist. iii. 327).

the archbishop presides with regal state; the upper house of bishops represent the house of lords; and the lower house, composed of representatives of the several dioceses at large, and of each particular chapter therein, resembles the house of commons with its knights of the shire and burgesses[f]. This constitution is said to be owing to the policy of Edward I.: who thereby at one and the same time let in the inferior clergy to the privileges of forming ecclesiastical canons (which before they had not), and also introduced a method of taxing ecclesiastical benefices, by consent of convocation[g] [37]. [280]

From this prerogative also, of being the head of the church, arises the king's right of nomination to vacant bishopricks, and certain other ecclesiastical preferments; which will more properly be considered when we come to treat of the clergy. I shall only here observe, that this is now done in consequence of the statute 25 Hen. VIII. c. 20.

As the head of the church, the king is likewise the *dernier resort* in all ecclesiastical causes; an appeal lying ultimately to him in chancery[38] from the sentence of every ecclesiastical judge; which right was restored to the crown by statute 25 Hen. VIII. c. 19, as will more fully be shewn hereafter.

[f] In the diet of Sweden, where the ecclesiastics form one of the branches of the legislature, the chamber of the clergy resembles the convocation of England. It is composed of the bishops and superintendents; and also of deputies, one of which is chosen by every ten parishes or rural deanery. (Mod. Un. Hist. xxxiii. 18).

[g] Gilb. Hist. of Exch. c. 4.

(37) Since the Reformation subsidies granted by the convocation have always been confirmed by parliament; an intimation to the convocation that the legislature did not acquiesce in their power of binding even the clergy in a matter of property. But this mode of ecclesiastical taxation was discontinued in 1664 by a verbal agreement between archbishop Sheldon and lord Clarendon, and at a period when the authority of the church stood very high, so that it could not have seemed to be the abandonment of a very important privilege. (Hallam. Con. Hist. vol. iii. p. 325).

(38) Transferred to the judicial committee of the privy council by 2 & 3 Wm. 4, c. 92. (See also 3 & 4 Wm. 4, c. 41).

CHAPTER VIII.

OF THE KING'S REVENUE.

The king's revenue prerogatives.

HAVING, in the preceding chapter, considered at large those branches of the king's *prerogative*, which contribute to his royal dignity, and constitute the executive power of the government, we proceed now to examine the king's *fiscal* prerogatives, or such as regard his *revenue*; which the British constitution hath vested in the royal person, in order to support his dignity and maintain his power: being a portion which each subject contributes of his property, in order to secure the remainder.

1. Ordinary revenue.

This revenue is either *ordinary* or *extraordinary*. The king's *ordinary* revenue is such, as has either subsisted time out of mind in the crown; or else has been granted by parliament, by way of purchase or exchange for such of the king's inherent hereditary revenues as were found inconvenient to the subject.

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When I say that it has subsisted time out of mind in the crown, I do not mean that the king is at present in the actual possession of the whole of this revenue. Much (nay the greatest part) of it is at this day in the hands of subjects, to whom it has been granted out from time to time by the kings of England, which has rendered the crown in some measure dependent on the people for its ordinary support and subsistence. So that I must be obliged to recount, as part of the royal revenue, what lords of manors and other subjects frequently look upon to be their own absolute inherent rights; because they are and have been vested in them and their ancestors for ages, though in reality originally derived from the grants of our ancient princes.

First, custody of bishops' temporalities.

I. The first of the king's ordinary revenues, which I shall take notice of, is of an *ecclesiastical kind* (as are also the three succeeding ones); viz. *the custody of the temporalities of bishops:* by which are meant all the lay revenues, lands, and tenements (in which is included his barony) which belong to an archbishop's or bishop's see. And these upon the vacancy of the bishoprick are immediately the right of the king, as a consequence of his prerogative in church matters; whereby he is considered as the founder of all archbishopricks and bishopricks, to whom during the vacancy they revert. And for the same reason, before the dissolution of abbeys, the king had the custody of the temporalities of all such abbeys and priories as were of royal foundation (but not of those founded by subjects) on the death of the abbot or prior [a]. Another reason may also be given, why the policy of the law hath vested this custody in the king; because, as the successor is not known, the lands and possessions of the see would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given the king, not the temporalities themselves, but the *custody* of the temporalities, till such time as a successor is appointed, with power of taking to himself all the intermediate profits, without any account of the successor; and with the right of presenting (which the crown very frequently exercises) to such benefices and other preferments as fall within the time of vacation [b]. This revenue is of so high a nature, that it could not be granted out to a subject, before, or even after, it accrued: but now by the statute 15 Edw. III. st. 4, c. 4 & 5, the king may, after the vacancy, lease the temporalities to the dean and chapter; saving to himself all advowsons, escheats, and the like. Our ancient kings, and particularly William Rufus, were not only remarkable for keeping the bishopricks a long time vacant, for the sake of enjoying the temporalities, but also committed horrible waste on the woods and other parts of the estate; and, to crown all, would never, when the see was filled up, restore to the bishop his temporalities again, unless he purchased them at an exorbitant price. To remedy which, king Henry the First [c] granted a charter at the beginning of his reign, promising neither to

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[a] 2 Inst. 15. [b] Stat. 17 Edw. II. st. 1, c. 14; F. N. B. 32. [c] Mat. Paris.

sell, nor let to farm, nor take any thing from the domains of the church, till the successor was installed. And it was made one of the articles of the great charter [d], that no waste should be committed in the temporalities of bishopricks, neither should the custody of them be sold. The same is ordained by the statute of Westminster the first [e]; and the statute of 14 Edw. III. st. 4, c. 4, (which permits, as we have seen, a lease to the dean and chapter) is still more explicit in prohibiting the other exactions. It was also a frequent abuse, that the king would, for trifling or no causes, seize the temporalities of bishops, even during their lives, into his own hands: but this is guarded against by statute 1 Edw. III. st. 2, c. 2 [1].

This revenue of the king, which was formerly very considerable, is now by a customary indulgence almost reduced to nothing: for at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalities quite entire, and untouched, from the king; and at the same time does homage to his sovereign: and then, and not sooner, he has a fee-simple in his bishoprick, and may maintain an action for the profits [f].

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Secondly, corodies.

II. The king is entitled to a *corody*, as the law calls it, out of every bishoprick, that is, to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promotes him to a benefice [g]. This is also in the nature of an acknowledgment to the king, as founder of the see, since he had formerly the same corody or pension from every abbey or priory of royal foundation. It is, I apprehend, now fallen into total disuse: though sir Matthew Hale says [h], that it is due of common right, and that no prescription will discharge it.

[d] 9 Hen. III. c. 5.
[e] 3 Edw. I. c. 21.
[f] Co. Litt. 67, 341.
[g] F. N. B. 230.
[h] Notes on F. N. B. above cited.

(1) Queen Elizabeth kept the see of Ely vacant on one occasion for eighteen years. (Strype, iv. 351). Both before and after the Reformation the episcopal revenues were much impoverished by the bishops themselves. (See Hallam. Con. Hist. i. 303—305). The statutes restraining these alienations by the bishops (1 Eliz. c. 19; 13 Eliz. c. 10), came too late to prevent many valuable possessions being granted away by the bishops; more especially since the exception contained in the first-mentioned statute in favour of alienation to the crown remained unrepealed until 1 Jac. 1, c. 3.

III. The king also (as was formerly observed[i]) is entitled to all the *tithes*[g] *arising in extraparochial places*[k]: though perhaps it may be doubted how far this article, as well as the last, can be properly reckoned a part of the king's own royal revenue; since a corody supports only his chaplains, and these extraparochial tithes are held under an implied trust, that the king will distribute them for the good of the clergy in general. Thirdly, tithes extra-parochial.

IV. The next branch consists in the *first-fruits, and tenths,* of all spiritual preferments in the kingdom; both of which I shall consider together. Fourthly, first-fruits and tenths.

These were originally a part of the papal usurpations over the clergy of this kingdom; first introduced by Pandulph the pope's legate, during the reigns of king John and Henry the Third, in the see of Norwich; and afterwards attempted to be made universal by the popes Clement V. and John XXII. about the beginning of the fourteenth century. The first-fruits, *primatæ* or *annates,* were the first year's whole profits of the spiritual preferment, according to a rate or *valor* made under the direction of pope Innocent IV. by Walter bishop of Norwich in 38 Hen. III., and afterwards advanced in value by commission from pope Nicholas III., A. D. 1292, 20 Edw. I.[l]: which valuation of pope Nicholas is still preserved in the exchequer[m][3]. The tenths, or *decimæ,* were the [285]

[i] Page 114.
[k] 2 Inst. 647.
[l] F. N. B. 176.
[m] 3 Inst. 154.

(2) Or the rent-charge now substituted in lieu thereof (See sect. 13 of the Tithe Commutation Act, 6 & 7 Wm. 4, c. 71).

(3) By this assessment the amount of all taxes, as well those paid to the king as to the pope, were regulated until the survey made in the 26 Hen. 8. The statutes of all colleges founded before the Reformation are also interpreted by this criterion. (Phill. Evid. ii. 101, 9th edit.) There are several errors in the text which Mr. Justice Coleridge has pointed out. The correct account is as follows:—In 1253, pope Innocent IV. granted all the first fruits and tenths to Henry 3 for three years, which occasioned a taxation in the following year, sometimes called the Norwich taxation, and sometimes Innocent's valuation. In 1288, Nicholas IV. (not III. as in the text), granted the tenths to Edward 1, for six years, and a new valuation was commenced in the same year by the king's precept, which valuation was, so far as it extended over the province of Canterbury, finished in 1291, and as to York also in the following year; the whole being under the direction of John bishop of Winton, and Oliver bishop of Lincoln. In 1318, a third taxation, entitled Nova Taxatio, was made, but this only extended over some part of the province of York. It became necessary

tenth part of the annual profit of each living by the same valuation, which was also claimed by the holy see, under no better pretence than a strange misapplication of that precept of the Levitical law, which directs[n], that the Levites "should offer the tenth part of their tithes as a heave-offering to the Lord, and give it to Aaron the *high* priest." But this claim of the pope met with a vigorous resistance from the English parliament; and a variety of acts were passed to prevent and restrain it, particularly the statute 6 Hen. IV. c. 1, which calls it a horrible mischief, and damnable custom. But the popish clergy, blindly devoted to the will of a foreign master, still kept it on foot; sometimes more secretly, sometimes more openly and avowedly: so that in the reign of Henry VIII, it was computed, that in the compass of fifty years 800,000 ducats had been sent to Rome for first-fruits only. And, as the clergy expressed this willingness to contribute so much of their income to the head of the church, it was thought proper (when in the same reign the papal power was abolished, and the king was declared the head of the church of England) to annex this revenue to the crown; which was done by statute 26 Hen. VIII. c. 3, (confirmed by statute 1 Eliz. c. 4,) and a new *valor beneficiorum* was then made, by which the clergy are at present rated[4].

By these last-mentioned statutes all vicarages under ten pounds a year, and all rectories under ten marks, are discharged from the payment of first-fruits: and if, in such livings as continue chargeable with this payment, the incumbent lives but half a year, he shall pay only one quarter of his first-fruits; if but one whole year, then half of them; if a year and a half, three quarters; and if two years, then the whole; and not otherwise.
[286] Likewise by the statute 27 Hen. VIII. c. 8, no tenths are to

[n] Numb. xviii. 26.

chiefly in consequence of the Scottish invasion of the border counties, which rendered the clergy of those districts unable to pay tenths and first fruits according to the higher valuation. It was made by virtue of royal mandate directed to the bishop of Carlisle.

(4) This *valor beneficiorum* is commonly called the "King's Books," a transcript of which is given in Ecton's Thesaurus and Bacon's Liber Regis. The reports of the commissioners appointed to inquire into the ecclesiastical revenues (1831) contain full and accurate information with reference to the actual present value of every species of church property.

be paid for the first year, for then the first fruits are due: and by other statutes of queen Anne, in the fifth and sixth years of her reign, if a benefice be under fifty pounds *per annum* clear yearly value, it shall be discharged from the payment of first-fruits and tenths[5].

Thus the richer clergy, being, by the criminal bigotry of their popish predecessors, subjected at first to a foreign exaction, were afterwards, when that yoke was shaken off, liable to a like misapplication of their revenues, through the rapacious disposition of the then reigning monarch: till at length the piety of queen Anne restored to the church what had been thus indirectly taken from it. Thus she did, not by remitting the tenths and first-fruits entirely; but, in a spirit of the truest equity, by applying these superfluities of the larger benefices to make up the deficiences of the smaller. And to this end she granted her royal charter, which was confirmed by the statute 2 Anne, c. 11, whereby all the revenue of first-fruits and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings. This is usually called queen Anne's bounty; which has been still farther regulated by subsequent statutes[o6].

V. The next branch of the king's ordinary revenue (which, as well as the subsequent branches, is of a *lay* or temporal nature) consists in the *rents and profits of the demesne lands of the crown*[7]. These demesne lands, *terræ dominicales regis*, Fifthly, profits of demesne lands.

[o] 5 Ann. c. 24; 6 Ann. c. 27; 1 Geo. I. st. 2, c. 10; 3 Geo. I. c. 10.

(5) It appears by the report of the select committee on first fruits, that out of 10,498 benefices with or without cure of souls, only 4898 are now liable to tenths, and of that number 4500 are also liable to first fruits. From the same report it appears, that although there are two archbishoprics, and twenty-three bishoprics now liable to first-fruits, there are only eighteen bishoprics liable to tenths.

(6) By 1 & 2 Vict. c. 20, the offices of first-fruits, tenths, and queen Anne's bounty, are consolidated and regulated. The amount of queen Anne's bounty has generally averaged of late years 14,000*l.* (Rep. of Sel. Com. 1837). Many attempts have been made to place the administration of this fund on a proper footing. (Parl. Deb. 1808, 1810, and vol. 42, p. 997, 1838). See also 1 & 2 Vict. c. 106, ss. 72, 119; c. 107, s. 10; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 20; 4 & 5 Vict. c. 39, s. 4, and Burn's Eccl. Law, *sub voce* First Fruits.

(7) The laws relating to the management and improvement of all the woods, forests, parks, and chases, within the survey of the exchequer and of the

being either the share reserved to the crown at the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, were anciently very large and extensive; comprising divers manors, honours, and lordships; the tenants of which had very peculiar privileges, as will be shewn in the second book of these commentaries, when we speak of the tenure in ancient demesne. At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned the parliament frequently to interpose; and
[287] particularly, after king William III. had greatly impoverished the crown, an act passed[p], whereby all future grants or leases from the crown for any longer term than thirty-one years or three lives are declared to be void; except with regard to houses which may be granted for fifty years[8]. And no reversionary lease can be made, so as to exceed together with the estate in being, the same term of three lives or thirty-one years: that is, where there is a subsisting lease, of which there are twenty years still to come, the king cannot grant a future interest, to commence after the expiration of the former, for any longer term than eleven years[9]. The tenant must also be made liable to be punished for committing waste; and the usual rent must be reserved, or, where there has usually been no rent, one-third of the clear yearly value[q 10]. The misfortune is, that this act was made too late, after almost every valuable

[p] 1 Ann. st. 1, c. 7. [1 & 2 Vict. c. 95, s. 4].

[q] In like manner, by the civil law, the inheritance or *fundi patrimoniales* of the imperial crown could not be alienated, but only let to farm. Cod. l. 11, t. 61.

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land revenues of the crown were consolidated and amended by 10 Geo. 4, c. 50. The entire management and improvement of the said estates and revenue are now entrusted to "the commissioners of woods, forests, land revenues, works, and buildings," subject nevertheless to the statutory restrictions on their power of alienation, &c., and the general supervision and control of the treasury.

(8) By 10 Geo. 4, c. 50, s. 23, the commissioners may grant building leases of the crown lands for ninety-nine years, see also ss. 24, 30, 31.

(9) Now leases of crown lands may be granted to take effect either in possession or in reversion; but for no term greater than thirty-one years, or, if granted for building purposes, ninety-nine years. (10 Geo. 4, c. 50, s. 26).

(10) The rack-rent must be reserved and the usual building covenants be contained in all crown leases. (See 10 Geo. 4, c. 50, ss. 27, 28, 33).

possession of the crown had been granted away for ever, or else upon very long leases; but may be of some benefit to posterity, when those leases come to expire.

Sixthly, profits of military tenures.

VI. Hither might have been referred the advantages which used to arise to the king from the *profits of his military tenures*, to which most lands in the kingdom were subject, till the statute 12 Car. II. c. 24, which in great measure abolished them all: the explication of the nature of which tenures must be postponed to the second book of these commentaries. Hither also might have been referred the profitable prerogative of purveyance and pre-emption: which was a right enjoyed by the crown of buying up provisions and other necessaries, by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation in preference to all others, and even without consent of the owner: and also of forcibly impressing the carriages and horses of the subject, to do the king's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price [11]. A prerogative which prevailed pretty [288] generally throughout Europe, during the scarcity of gold and silver, and the high valuation of money consequential thereupon. In those early times the king's household (as well as those of inferior lords) were supported by specific renders of corn, and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the royal use [r]. And this answered all purposes, in those ages of simplicity, so long as the king's court continued in any certain place. But when it removed from one part of the kingdom to another (as was formerly very frequently done), it was found necessary to send purveyors beforehand to get together a sufficient quantity of

[r] 4 Inst. 273.

(11) Purveyance seems to have been little less than a royal right of spoil, and was a very ancient topic of remonstrance from the House of Commons. Not less than thirty-six statutes had been directed against it before the reign of James I. (Hallam. Con. Hist. i. 414; see also Vattel's Law of Nations, 115, 116).

provisions and other necessaries for the household; and, lest the unusual demand should raise them to an exorbitant price, the powers before mentioned were vested in these purveyors; who, in process of time, very greatly abused their authority, and became a great oppression to the subject, though of little advantage to the crown; ready money in open market (when the royal residence was more permanent, and specie began to be plenty) being found upon experience to be the best proveditor of any. Wherefore by degrees the powers of purveyance have declined, in foreign countries as well as our own: and particularly were abolished in Sweden by Gustavus Adolphus towards the beginning of the last century [s]. And with us in England, having fallen into disuse during the suspension of monarchy, king Charles at his restoration consented, by the same statute, to resign entirely these branches of his revenue and power: and the parliament, in part of recompense, settled on him, his heirs and successors for ever, the hereditary exercise of fifteen pence *per* barrel on all beer and ale sold in the kingdom, and a proportionable sum for certain other liquors. So that this hereditary excise, the nature of which shall be farther explained in the subsequent part of this chapter, now forms the sixth branch of his majesty's ordinary revenue.

Seventhly, wine licenses. [289]

VII. A seventh branch might also be computed to have arisen from *wine licenses;* or the rents payable to the crown by such persons as are licensed to sell wine by retail throughout England, except in a few privileged places. These were first settled on the crown by the statute 12 Car. II. c. 25, and together with the hereditary excise, made up the equivalent in value for the loss sustained by the prerogative in the abolition of the military tenures, and the right of pre-emption and purveyance: but this revenue was abolished by the statute 30 Geo. II. c. 19, and an annual sum of upwards of 7000*l. per annum*, issuing out of the new stamp duties imposed on wine licenses, was settled on the crown in its stead.

Eighthly, profits of forests.

VIII. An eighth branch of the king's ordinary revenue is usually reckoned to consist in the profits arising from his forests. Forests are waste grounds belonging to the king,

[s] Mod. Un. Hist. xxxiii. 220.

replenished with all manner of beasts of chase or venery; which are under the king's protection, for the sake of his royal recreation and delight: and, to that end, and for preservation of the king's game, there are particular laws, privileges, courts and offices belonging to the king's forests; all which will be, in their turns, explained in the subsequent books of these commentaries. What we are now to consider are only the profits arising to the king from hence, which consist principally in amercements or fines levied for offences against the forest-laws. But as few, if any, courts of this kind for levying amercements [t] have been held since 1632, 8 Car. I., and as, from the accounts given of the proceedings in that court by our histories and law-books [u], nobody would now wish to see them again revived, it is needless (at least in this place) to pursue this inquiry any farther [12].

Ninthly, profits of courts of law.

IX. The *profits* arising from the king's *ordinary courts of justice* make a ninth branch of his revenue. And these consist not only in fines imposed upon offenders, forfeitures of recognizances, and amercements levied upon defaulters; but also in certain fees due to the crown in a variety of legal matters, as, for setting the great seal to charters, original writs, and other forensic proceedings, and for permitting fines to be levied of lands in order to bar entails, or otherwise to ensure their title. As none of these can be done without the immediate intervention of the king, by himself or his officers, the law allows him certain perquisites and profits, as a recompense for the trouble he undertakes for the public. These, in pro-

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[t] Roger North, in his life of lord keeper North (43, 44), mentions an eyre, or *iter*, to have been held south of Trent soon after the Restoration; but I have met with no report of its proceedings.

[u] 1 Jones, 267—298.

(12) The reader will find in Hallam. Con. His. vol. ii. pp. 13, 14, several instances of the arbitrary extension of the limits of the royal forests by Charles 1. But in 1641, this fruitful source of oppression and complaint was put an end to by the Long Parliament; 16 Car. 1, c. 16, limiting the extent of royal forests to their boundaries in 1622, and annulling and declaring void all the perambulations and inquests by which they had subsequently been enlarged; it being also enacted that no place should be thereafter accounted forest where forest courts had not been held before 1625. In 4 Inst. 319, Lord Coke says, that the number of royal forests in England is sixty-nine. (See also 4 Inst. 293).

cess of time, have been almost all granted out to private persons, or else appropriated to certain particular uses[13]: so that, though our law-proceedings are still loaded with their payment, very little of them is now returned into the king's exchequer; for a part of whose royal maintenance they were originally intended. All future grants of them, however, by the statute 1 Ann. st. 2, c. 7, are to endure for no longer time than the prince's life who grants them.

Tenthly, royal fish.

X. A tenth branch of the king's ordinary revenue, said to be grounded on the consideration of his guarding and protecting the seas from pirates and robbers, is the right to *royal fish*, which are whale and sturgeon: and these, when either thrown ashore, or caught near the coast, are the property of the king, on account[v] of their superior excellence. Indeed our ancestors seem to have entertained a very high notion of the importance of this right; it being the prerogatives of the kings of Denmark and the dukes of Normandy;[w] and from one of these it was probably derived to our princes. It is expressly claimed and allowed in the statute *de prærogativa regis*[x]; and the most ancient treatises of law now extant make mention of it;[y] though they seem to have made a distinction between whale and sturgeon, as was incidentally observed in a former chapter[z].

Eleventhly, shipwrecks.

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XI. Another maritime revenue, and founded partly upon the same reason, is that of *shipwrecks:* which are also declared to be the king's property by the same prerogative statute 17 Edw. II. c. 11, and were so, long before, at the common law. It is worthy observation, how greatly the law of wrecks has been altered, and the rigour of it gradually

[v] Plowd. 315.

[w] Stiernh. de jure Sueonum. l. 2, c. 8; Gr. Coustum. cap. 17.

[x] 17 Edw. II. c. 11.

[y] Bracton, l. 3, c. 3; Britton, c. 17; Fleta, l. 1, c. 45, 46; Memorand. Scacch'. H. 24 Edw. I. 37, prefixed to Maynard's year-book of Edward II.

[z] Ch. 4, p. 223.

(13) By the stat. 3 & 4 Wm. 4, c. 99, s. 29, it was enacted, that accurate returns of all fines, penalties, recognizances, and deodands should be sent to the treasury and to the commissioners of audit; and various other clauses were enacted in the same statute for their more speedy recovery and correct ascertaining of the amount of this branch of royal revenue.

softened in favour of the distressed proprietors. Wreck, by the ancient common law, was where any ship was lost at sea, and the goods or cargo were thrown upon the land; in which case these goods, so wrecked, were adjudged to belong to the king: for it was held, that, by the loss of the ship, all property was gone out of the original owner [a]. But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore it was first ordained by king Henry I. that if any person escaped alive out of the ship it should be no wreck [b]; and afterwards king Henry II., by his charter [c], declared, that if on the coasts of either England, Poicton, Oleron, or Gascony, any ship should be distressed, and either man or beast should escape or be found therein alive, the goods should remain to the owners, if they claimed them within three months; but otherwise should be esteemed a wreck, and should belong to the king, or other lord of the franchise. This was again confirmed with improvements by king Richard the First; who, in the second year of his reign [d], not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped, "*omnes res suas liberas et quietas haberet*," but also, that, if he perished, his children, or in default of them his brethren and sisters, should retain the property; and, in default of brother or sister, then the goods should remain to the king [e]. And the law, as laid down by Bracton in the reign of Henry III., seems still to have improved in its equity. For then, if not only a dog (for instance) escaped, by which the [292] owner might be discovered, but if any certain mark were set on the goods, by which they might be known again, it was held to be no wreck [f]. And this is certainly most agreeable to reason; the rational claim of the king being only founded upon this, that the true owner cannot be ascertained. Afterwards, in the statute of Westminster the first [g], the time of

[a] Dr. & St. d. 2, c. 51.

[b] Spelm. Cod. apud Wilkins, 305.

[c] 26 May, A.D. 1174; 1 Rym. Fœd. 36.

[d] Rog. Hoved. in Ric. I.

[e] In like manner Constantine the great, finding that by the imperial law the revenue of wrecks was given to the prince's treasury or *fiscus*, restrained it by an edict (Cod. 11, 5, 1), and ordered them to remain to the owners, adding this humane expostulation, "*quod enim jus habet fiscus in aliena calamitate, ut de re tam luctuosa compendium sectetur?*"

[f] Bract. l. 3, c. 3.

[g] 3 Edw. I. c. 4.

limitation of claims, given by the charter of Henry II., is extended to a year and a day, according to the usage of Normandy [h]: and it enacts, that if a man, a dog, or a cat, escape alive, the vessel shall not be adjudged a wreck. These animals, as in Bracton, are only put for examples [i], for it is now held [j], that not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which come to shore, they shall not be forfeited as wreck. The statute further ordains, that the sheriff of the county shall be bound to keep the goods a year and a day (as in France, for one year, agreeably to the maritime laws of Oleron [k], and in Holland for a year and a half), that if any man can prove a property in them, either in his own right or by right of representation [l], they shall be restored to him without delay; but if no such property be proved within that time, they then shall be the king's. If the goods are of a perishable nature, the sheriff may sell them, and the money shall be liable in their stead [m]. This revenue of wrecks is frequently granted out to lords of manors, as a royal franchise; and if any one be thus entitled to wrecks in his own land, and the king's goods are wrecked thereon, the king may claim them at any time, even after the year and day [n].

It is to be observed, that, in order to constitute a legal *wreck*, the goods must come to land. If they continue at sea, the law distinguishes them by the barbarous and uncouth
[293] appellations of *jetsam*, *flotsam*, and *ligan*. Jetsam is where goods are cast into the sea, and there sink and remain under water: flotsam is where they continue swimming on the surface of the waves: ligan is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again [o]. These are also the king's, if no owner appears to claim them; but if any owner appears, he is entitled to recover the possession. For even if they be cast overboard, without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed to have renounced his pro-

[h] Gr. Coustum. c. 17.
[i] Flet. l. 1, c. 44; 2 Inst. 167; 5 Rep. 107.
[j] Hamilton *v.* Davies, Trin. 11 Geo. 3, B. R. 1771. [5 Burr. 2732].
[k] § 28.
[l] 2 Inst. 168.
[m] Plowd. 465.
[n] 2 Inst. 168; Bro. Abr. tit. Wreck.
[o] 5 Rep. 106.

perty [p]: much less can things ligan be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are therefore accounted so far a distinct thing from the former, that by the king's grant to a man of wrecks, things jetsam, flotsam, and ligan will not pass [q].

Wrecks, in their legal acceptation, are at present not very frequent, for if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited by law. And in order to preserve this property entire for him, and if possible to prevent wrecks at all, our laws have made many very humane regulations; in a spirit quite opposite to those savage laws, which formerly prevailed in all the northern regions of Europe, and a few years ago were still said to subsist on the coast of the Baltic sea, permitting the inhabitants to seize on whatever they could get as lawful prize: or as an author of their own expresses it, "*in naufragorum miseria et calamitate tanquam vultures ad prædam currere* [r]." For by the statute of 27 Edw. III. c. 13, if any ship be lost on the shore, and the goods come to land (which cannot, says the statute be called wreck), they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is entitled *salvage*. Also [294] by the common law, if any persons (other than the sheriff) take any goods so cast on shore, which are not legal wreck, the owners might have a commission to inquire and find them out, and compel them to make restitution [s]. And by statute 12 Ann. st. 2, c. 18, confirmed by 4 Geo. I. c. 12, in order to assist the distressed, and prevent the scandalous illegal practises on some of our sea-coasts (too similar to those on the Baltic), it is enacted, that all head-officers and others of towns near the sea shall, upon application made to them, summon as many hands as are necessary, and send them to the relief of any ship in distress, on forfeiture of 100*l.*; and, in case of assistance given, salvage shall be paid by the owners,

[p] *Quæ enim res in tempestate, levandæ navis causa, ejiciuntur, hæ dominorum permanent. Quia palam est, eas non eo animo ejici, quod quis habere nolit.* Inst. 2, 1, § 48.

[q] 5 Rep. 108.

[r] Stiernh. de jure Sueon. l. 3, c. 5.

[s] F. N. B. 112.

to be assessed by three neighbouring justices. All persons that secrete any goods shall forfeit their treble value: and if they wilfully do any act whereby the ship is lost or destroyed, by making holes in her, stealing her pumps, or otherwise, they are guilty of felony, without benefit of clergy[14]. Lastly, by the statute 26 Geo. II. c. 19, plundering any vessel either in distress or wrecked, and whether any living creature be on board or not (for, whether wreck or otherwise, it is clearly not the property of the populace), such plundering, I say, or preventing the escape of any person that endeavours to save his life, or wounding him with intent to destroy him, or putting out false lights in order to bring any vessel into danger, are all declared to be capital felonies[15]; in like manner as the destroying of trees, steeples, or other stated sea-marks, is punished by the statute 8 Eliz. c. 13, with a forfeiture of 100*l.* or outlawry. Moreover by the statute of Geo. II., pilfering any goods cast on shore is declared to be petty larceny; and many other salutary regulations are made for the more effectually preserving ships of any nation in distress[s].

[s] By the civil law, to destroy persons shipwrecked, or prevent their saving the ship, is capital. And to steal even a plank from a vessel in distress, or wrecked, makes the party liable to answer for the whole ship and cargo. (Ff. 47, 9, 3). The laws also of the Wisigoths, and the most early Neapolitan constitutions, punished with the utmost severity all those who neglected to assist any ship in distress, or plundered any goods cast on shore. (Lindenbrog. Cod. LL. antiq. 146, 715).

(14) By 49 Geo. 3, c. 122, further provisions were made for preventing frauds and depredations committed on merchants, ship owners, and underwriters by boatmen and others; and certain defects relative to the adjustment of salvage were remedied by the same statute. See also 1 & 2 Geo. 4, cc. 75, 76; 7 & 8 Geo. 4, c. 19, s. 47; 7 Wm. 4, and 1 Vict. c. 90, s. 1, by the former of which statutes, goods, claimed as wreck by lords of manors and others, must not be appropriated until a year and a day after notice of the wreck and description of the goods have been sent to the deputy vice admiral.

(15) The plundering of wrecks or ships in distress is now punishable by transportation for fifteen or twenty years, or imprisonment for three years with or without hard labour or solitary confinement. (See 7 Wm. 4, and 1 Vict. c. 87, s. 8). To hang out false lights with intent to cause shipwreck, is still retained among the few felonies punishable with death. (See 7 Wm. 4 and 1 Vict. c. 89, s. 5). To impede any person endeavouring to save his life from shipwreck is punishable with transportation for life. (See 7 Wm. 4 and 1 Vict. c. 89, s. 7).

XII. A twelfth branch of the royal revenue, the right to *mines*, has its original from the king's prerogative of coinage, in order to supply him with materials; and therefore those mines, which are properly royal, and to which the king is entitled when found, are only those of silver and gold [t]. By the old common law, if gold or silver be found in mines of base metal, according to the opinion of some the whole was a royal mine, and belonged to the king; though others held that it only did so, if the quantity of gold or silver was of greater value than the quantity of base metal [u]. But now by the statutes 1 W. & M. st. 1, c. 30, and 5 W. & M. c. 6, this difference is made immaterial; it being enacted, that no mines of copper, tin, iron, or lead, shall be looked upon as royal mines, notwithstanding gold or silver may be extracted from them in any quantities: but that the king, or persons claiming royal mines under his authority, may have the ore (other than tin ore in the counties of Devon and Cornwall [16]), paying for the same a price stated in the act. This was an extremely reasonable law: for now private owners are not discouraged from working mines, through a fear that they may be claimed as royal ones; neither does the king depart from the just rights of his revenue, since he may have all the precious metals contained in the ore, paying no more for it than the value of the base metal which it is supposed to be; to which base metal the land-owner is by reason and law entitled. Twelfth, mines of silver and gold.

XIII. To the same original may in part be referred the revenue of treasure-trove (derived from the French word, *trover*, to find), called in Latin *thesaurus inventus*, which is where any money, or coin, gold, silver, plate, or bullion, is found hidden *in* the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the king: but if he that hid it be known, or afterwards found out, the owner, and not the king, is entitled to it [v]. Also if it be found in the sea, or *upon* the earth, it doth not belong to the [296] Thirteenth, treasure-trove.

[t] 2 Inst. 577. [u] Plowd. 336.
[v] 3 Inst. 132; Dalt. of Sheriffs, c. 16.

(16) The coinage duties, so far as they affect tin ore in Devon or Cornwall, were abolished by 1 & 2 Vict. c. 120; see also 2 & 3 Vict. c. 58.

king, but the finder, if no owner appears[w] [17]. So that it seems it is the *hiding*, and not the *abandoning* of it, that gives the king a property: Bracton[x], defining it, in the words of the civilians, to be *vetus depositio pecuniæ*." This difference clearly arises from the different intentions which the law implies in the owner. A man, that hides his treasure in a secret place, evidently does not mean to relinquish his property; but reserves a right of claiming it again, when he sees occasion: and if he dies, and the secret also dies with him, the law gives it to the king in part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it: and therefore it belongs as in a state of nature, to the first occupant or finder; unless the owner appear and assert his right, which then proves that the loss was by accident, and not with an intent to renounce his property.

Formerly all treasure-trove belonged to the finder[y]; as was also the rule of the civil law[z]. Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king: which part was assigned to be all *hidden* treasure; such as is *casually lost* and unclaimed, and also such as is *designedly abandoned*, still remaining the right of the fortunate finder. And that the prince shall be entitled to this *hidden* treasure is now grown to be, according to Grotius[a], "*jus commune et quasi gentium:*" for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark. The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our constitution, than at present. When the Romans, and other inhabitants of the respective countries which composed their

[w] Britt. c. 17; Finch. 177.
[x] l. 3, c. 3, § 4.
[y] Bracton, l. 3, c. 3; 3 Inst. 133.
[z] Ff. 41, 1, 31.
[a] De jur. b. et p. l. 2, c. 8, § 7.

(17) Thus in the case of *Armory* v. *Delamerie* (Str. 505), a chimney-sweeper's boy recovered the value of the finest diamond which would fit the socket of a jewel, which the boy had found in the street, from a goldsmith who detained from him the diamond which had been in the socket when the jewel was tendered to the goldsmith. (See also 7 M. & W. 623).

empire, were driven out by the northern nations, they concealed their money under ground; with a view of resorting to it again when the heat of the irruption should be over, and the [297] invaders driven back to their desarts. But, as this never happened, the treasures were never claimed; and on the death of the owners the secret also died along with them. The conquering generals, being aware of the value of these hidden mines, made it highly penal to secrete them from the public service. In England therefore, as among the feudists[b], the punishment of such as concealed from the king the finding of hidden treasure was formerly no less than death; but now it is only fine and imprisonment[c].

Fourteenth, waifs.

XIV. Waifs, *bona waviata*, are goods stolen, and waived or thrown away by the thief in his flight, for fear of being apprehended. These are given to the king by the law, as a punishment upon the owner, for not himself pursuing the felon, and taking away his goods from him[d]. And therefore if the party robbed do his diligence immediately to follow and apprehend the thief (which is called making fresh *suit*), or do convict him afterwards, or procure evidence to convict him, he shall have his goods again[e]. Waived goods do also not belong to the king, till seized by somebody for his use; for if the party robbed can seize them first, though at the distance of twenty years, the king shall never have them[f]. If the goods are hid by the thief, or left any where by him, so that he had not them about him, when he fled, and therefore did not throw them away in his flight; these also are not *bona waviata*, but the owner may have them again when he pleases[g]. The goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs[h]; the reason whereof may be, not only for the encouragement of trade, but also because there is no wilful default in the foreign merchant's not pursuing the thief; he being generally a stranger to our laws, our usages, and our language.

Fifteenth, estrays.

XV. Estrays are such valuable animals as are found wan-

[b] Glanv. l. 1, c. 2; Crag. 1, 16, 40.
[c] 3 Inst. 133.
[d] Cro. Eliz. 694.
[e] Finch. L. 212.
[f] Ibid.
[g] 5 Rep. 109.
[h] Fitzh. Abr. tit. Estray, 1; 3 Bulstr. 19.

dering in any manor or lordship, and no man knoweth the owner of them, in which case the law gives them to the king as the general owner, and lord paramount of the soil, in recompense for the damage which they may have done therein: and they now most commonly belong to the lord of the manor by special grant from the crown[18]. But, in order to vest an absolute property in the king, or his grantees, they must be proclaimed in the church and two market towns next adjoining to the place where they are found; and then, if no man claims them, after proclamation and a year and a day passed, they belong to the king or his substitute without redemption[i]; even though the owner were a minor, or under any other legal incapacity[k]. A provision similar to which obtained in the old Gothic constitution, with regard to all things that were found, which were to be thrice proclaimed; *primum coram comitibus et viatoribus obviis, deinde in proxima villa vel pago, postremo coram ecclesia vel judicio:* and the space of a year was allowed for the owner to reclaim his property[l]. If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them[m][19]. The king or lord has no property till the year and day passed: for if a lord keepeth an estray three quarters of a year, and within the year it strayeth again, and another lord getteth it, the other lord cannot take it again[n]. Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property as sheep, oxen, swine, and horses, which we in general call cattle; and so Fleta[o] defines them, *pecus vagans, quod nullus petit, sequitur vel advocat.* For animals upon which the law sets no value, as a dog or cat, and animals *feræ naturæ*, as a bear or wolf, cannot be considered as estrays. So

[i] Mirr. c. 3, § 19.
[k] 5 Rep. 108; Bro. Abr. tit. Estray, Cro. Eliz. 716.
[l] Stiernh. de jure Gothor. l. 3, c. 5.
[m] Dalt. Sh. 79.
[n] Finch. L. 177.
[o] l. 1, c. 43.

(18) It is confirmatory of this origin of the right of taking estrays, that the cattle of the king are not subject to it. (1 Roll. Abr. 878).

(19) But if any other person find and take care of another's property, not being entitled to it as an estray, the owner may recover it or its value, without being obliged to pay the expenses incurred by the finder; as for example, in keeping a pointer dog which had strayed (2 Bl. Rep. 1117); or in placing timber carried by the tide away from its moorings in a place of safety. (2 Hen. Bl. 254).

swans may be estrays, but not any other fowl[p]; whence they are said to be royal fowl. The reason of which distinction seems to be, that cattle and swans being of a reclaimed nature, the owner's property in them is not lost merely by their temporary escape; and they also, from their intrinsic value, are a sufficient pledge for the expense of the lord of the franchise in keeping them the year and day. For he that takes an [299] estray is bound, so long as he keeps it, to find it in provisions, and preserve it from damage[q]; and may not use it by way of labour, but is liable to an action for so doing[r]. Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit of the animal[s].

Besides the particular reasons before given why the king should have the several revenues of royal fish, shipwrecks, treasure-trove, waifs, and estrays, there is also one general reason which holds for them all: and that is, because they are *bona vacantia*, or goods in which no one else can claim a property[20]. And therefore by the law of nature they belonged to the first occupant or finder; and so continued under the imperial law. But, in settling the modern constitutions of most of the governments of Europe, it was thought proper (to prevent that strife and contention, which the mere title of occupancy is apt to create and continue, and to provide for the support of public authority in a manner the least burthensome to individuals) that these rights should be annexed to the supreme power by the positive laws of the state. And so it came to pass that, as Bracton expresses it[t], *hæc quæ nullius in bonis sunt, et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium.*

XVI. The next branch of the king's ordinary revenue Sixteenth, forfeitures of goods for offences.

[p] 7 Rep. 17.
[q] 1 Roll. Abr. 878.
[r] Cro. Jac. 147.
[s] Cro. Jac. 148; Noy. 119.
[t] l. 1, c. 12.

(20) This passage has been thought inconsistent with the doctrine stated supra, p. 296, viz., that all things found in the sea or upon the earth belong not to the king but the finder, which is undoubtedly the general rule. But in the particular cases enumerated in the text, the positive law has, for certain special reasons, given the enumerated articles to the crown; and in this passage, Blackstone is merely assigning as an additional reason why the crown should have them, this circumstance, that the operation of the general rule would confer them on the first finder, as being *bona vacantia*.

consists in *forfeitures of lands and goods* for offences; *bona confiscata*, as they are called by the civilians, because they belonged to the *fiscus* or imperial treasury; or as our lawyers term them, *forisfacta*; that is, such whereof the property is gone away, or departed from the owner. The true reason and only substantial ground of any forfeiture for crimes consist in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. If
[300] therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him. Hence, in every offence of an atrocious kind, the laws of England have exacted a total confiscation of the moveables or personal estate; and in many cases a perpetual, in others only a temporary loss of the offender's immoveables or landed property; and have vested them both in the king, who is the person supposed to be offended, being the one visible magistrate in whom the majesty of the public resides. The particulars of these forfeitures will be more properly recited when we treat of crimes and misdemeanors. I therefore only mention them here for the sake of regularity, as a part of the *census regalis*; and shall postpone for the present the farther consideration of all forfeitures, excepting one species only, which arises from the misfortune rather than the crime of the owner, and is called a *deodand*.

Deodands. By this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature: which is forfeited to the king, to be applied to pious uses, and distributed in alms by his high almoner[u]; though formerly destined to a more superstitious purpose. It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church[w]: in the same manner as the

[u] 1 Hal. P. C. 419 Fleta, l. 1, c. 25.

[w] Fitzh. Abr. tit. Enditement, pl. 27; Staunf. P. C. 20, 21.

apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no deodand is due where an infant under the age of discretion is killed by a fall *from* a cart, or horse, or the like, not being in motion [x]; whereas, if an adult person falls from thence and is killed, the thing is certainly forfeited. For the reason given by sir Matthew [301] Hale seems to be very inadequate, *viz.* because an infant is not able to take care of himself; for why should the owner save his forfeiture on account of the imbecility of the child, which ought rather to have made him more cautious to prevent any accident of mischief? The true ground of this rule seems rather to have been, that the child, by reason of its want of discretion, was presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses: but every adult, who died in actual sin, stood in need of such atonement, according to the humane superstition of the founders of the English law [21].

Thus stands the law if a person be killed by a fall from a thing standing still. But if a horse, or ox, or other animal, of his own motion, kill as well an infant as an adult, or if a cart run over him, they shall in either case be forfeited as deodands [y]; which is grounded upon this additional reason, that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture. A like punishment is in like cases inflicted by the Mosaical law [z]; "if an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten." And, among the Athenians [a], whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic. Where a thing not in motion is the occasion of a

[x] 3 Inst. 57; 1 Hal. P. C. 422.

[y] *Omnia, quæ movent ad mortem, sunt Deo danda.* Bracton, l. 3, c. 5.

[z] Exod. xxi. 28.

[a] Æschin. con. Ctesiph. Thus too, by our ancient law, a well in which a person was drowned was ordered to be filled up, under the inspection of the coroner. Flet. l. 1, c. 25, § 10; Fitzh. Abr. t. corone. 416.

(21) The reason for this exception to the general rule of law must be sought elsewhere. If it had been suggested by the want of discretion in the infant, it would have extended to idiots and to deaths caused by things in motion as well to those caused by things not in motion, which it does not, as the learned commentator himself notices in the succeeding paragraph.

man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a deodand[b]: but, wherever the thing is in motion, not only that part which immediately gives the wound (as the wheel, which runs over his body), but all things which move with it, and help to make the wound more dangerous (as the cart and loading, which
[302] increase the pressure of the wheel), are forfeited[c]. It matters not whether the owner were concerned in the killing or not: for, if a man kills another with my sword, the sword is forfeited[d] as an accursed thing[e]. And therefore, in all indictments for homicide, the instrument of death and the value are presented and found by the grand jury (as, that the stroke was given by a certain penknife, value sixpence), that the king or his grantee may claim the deodand: for it is no deodand, unless it be presented as such by a jury of twelve men[f]. No deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the common law: but if a man falls from a boat or ship in fresh water, and is drowned, it hath been said, that the vessel and cargo are in strictness of law a deodand[g]. But juries have of late very frequently taken upon themselves to mitigate those forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death[22]. And in such cases, although the finding by the jury be hardly warrantable by law, the court of king's bench hath generally refused to interfere on behalf of the lord of the franchise, to assist so unequitable a claim[h].

[b] 1 Hal. P. C. 422.

[c] 1 Hawk. P. C. c. 26.

[d] A similar rule obtained among the ancient Goths. *Si quis, me nesciente, quocunque meo telo vel instrumento in perniciem suam abutatur; vel ex ædibus meis cadat, vel incidat in puteum meum, quantumvis tectum et munitum, vel in cataractam, et sub molendino meo confringatur, ipse aliqua mulcta plectar; ut in parte infelicitatis meæ numeratur, habuisse vel ædificasse aliquod quo homo periret.* Stiernhook de jure Goth. l. 3, c. 4.

[e] Dr. & St. d. 2, c. 51.

[f] 3 Inst. 57.

[g] 3 Inst. 58; 1 Hal. P. C. 423; Molloy de jure maritim. 2, 225.

[h] Foster of homicide, 266.

(22) Since the extensive introduction of steam power, juries have taken an opposite course, and sought to render engineers, drivers, stokers, *et id genus omne* more careful, by imposing very heavy deodands on all accidents arising in the slightest degree from carelessness. Coroners' inquisitions are, however, so notoriously informal, that few instances occur in which such deodands have not been set aside on some technical objections. (Sed vide 6 & 7 Vict. c. 83).

Deodands, and forfeitures in general, as well as wrecks, treasure-trove, royal fish, mines, waifs, and estrays, may be granted by the king to particular subjects, as a royal franchise: and indeed they are for the most part granted out to the lords of manors, or other liberties: to the perversion of their original design.

Seventeenth, escheats.

XVII. Another branch of the king's ordinary revenue arises from escheats of lands, which happen upon the defect of heirs to succeed to the inheritance; whereupon they in general revert to and vest in the king, who is esteemed, in the eye of the law, the original proprietor of all the lands of the kingdom. But the discussion of this topic more properly belongs to the second book of these Commentaries, wherein we shall particularly consider the manner in which lands may be acquired or lost by escheat.

Eighteenth, custody of idiots and lunatics.

XVIII. I proceed therefore to the eighteenth and last branch of the king's ordinary revenue; which consists in the custody of idiots, from whence we shall be naturally led to consider also the custody of lunatics.

[303]

An idiot, or natural fool, is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any. For which reason the custody of him and of his lands was formerly vested in the lord of the fee[i] (and therefore still, by special custom, in some manors the lord shall have the ordering of idiot and lunatic copyholders[j]); but, by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king, as the general conservator of his people; in order to prevent the idiot from wasting his estate; and reducing himself and his heirs to poverty and distress[k]. This fiscal prerogative of the king is declared in parliament by statute 17 Edw. II. c. 9, which directs (in affirmance of the common law[l]) that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessaries; and after the death of such idiots he shall render the estate to the heirs: in order to prevent such

[i] Flet. l. 1, c. 11, § 10.
[j] Dyer, 302; Hutt. 17; Noy. 27.
[k] F. N. B. 232.
[l] 4 Rep. 126. Memorand' Scacc' 20 Edw. I. (prefixed to Maynard's year-book of Edw. II.) fol. 20, 24.

idiots from aliening their lands, and their heirs from being disinherited.

[304] By the old common law there is a writ *de idiota inquirendo*, to inquire whether a man be an idiot or not[m]: which must be tried by a jury of twelve men: and, if they find him *purus idiota*, the profits of his lands and the custody of his person may be granted by the king to some subject, who has interest enough to obtain them[n]. This branch of the revenue hath long been considered as a hardship upon private families: and so long ago as in the 8 Jac. 1, it was under the consideration of parliament, to vest this custody in the relations of the party, and to settle an equivalent on the crown in lieu of it; it being then proposed to share the same fate with the slavery of the feodal tenures, which has been since abolished[o]. Yet few instances can be given of the oppressive exertion of it, since it seldom happens that a jury finds a man an idiot *a nativitate*, but only *non compos mentis* from some particular time; which has an operation very different in point of law.

A man is not an idiot[p], if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. But a man who is born deaf, dumb, and blind, is looked upon by the law in the same state with an idiot[q]; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas[23].

A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason[r]. A lunatic is indeed properly one that hath had lucid intervals: sometimes enjoying his senses, and sometimes not, and that frequently depending upon the changes of the moon. But under the general name of *non compos*

[m] F. N. B. 232.

[n] This power, though of late very rarely exerted, is still alluded to in common speech, by that usual expression of *begging* a man for a fool.

[o] 4 Inst. 203; Com. Journ. 1610.

[p] F. N. B. 233.

[q] Co. Litt. 42; Fleta, l. 6, c. 40.

[r] *Idiota a casu et infirmitate.* Mem. Scacch. 20 Edw. I. (in Maynard's year-book of Edw. II.) 20.

(23) In *Yong* v. *Sant*, Dyer, 56 a, it was held that one who had become deaf, dumb, and blind by accident, not having been born so, was to be deemed *non compos mentis*. The presumption that a person deaf, dumb, and blind from his nativity is an idiot, is only a legal presumption, and is therefore, open to be rebutted by evidence of capacity. (Chitty's Med. Jur. i. 301, 345).

mentis (which sir Edward Coke says is the most legal name[s]) are comprised not only lunatics, but persons under frenzies, or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so; or such, in short, as are judged by the court of chancery incapable of conducting their own affairs. To these also, as well as idiots, the king is guardian, but to a very different purpose. For the law always imagines, that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it is declared by the statute 17 Edw. II. c. 10, that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they come to their right mind; and the king shall take nothing to his own use; and if the parties die in such estate, the residue shall be distributed for their souls by the advice of the ordinary, and of course (by the subsequent amendments of the law of administration) shall now go to their executors or administrators.

On the first attack of lunacy or other occasional insanity, while there may be hopes of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody under the direction of their nearest friends and relations; and the legislature, to prevent all abuses incident to such private custody, hath thought proper to interpose its authority, by statute 14 Geo. III. c. 49, (continued by 19 Geo. III. c. 15[24]),

[s] 1 Inst. 246.

(24) Lunatic asylums may be divided into two classes; county lunatic asylums and private madhouses.

For the laws relating to the erection and regulation of the former and the care and maintenance of pauper lunatics confined therein, see 9 Geo. 4, c. 40. Insane persons charged with offences may be committed to the county lunatic asylums under the provisions contained in 39 & 40 Geo. 3, c. 94, amended by 1 & 2 Vict. c. 14, and 3 & 4 Vict. c. 54.

The laws relating to private madhouses are laid down in 2 & 3 Wm. 4, c. 107, and 3 & 4 Wm. 4, c. 64, continued until 5th of October, 1844, by 5 Vict. c. 4. These houses must be annually licensed; they are open to inspection by visitors and commissioners; no person can be received into any such house without the certificate of two physicians, surgeons, or apothecaries; registers of the inmates are to be kept, &c. See also 5 & 6 Vict. c. 87.

for regulating private mad-houses. But, when the disorder is grown permanent, and the circumstances of the party will bear such additional expense, it is proper to apply to the royal authority to warrant a lasting confinement.

The method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, to whom, by special authority from the king, the custody of idiots and lunatics is intrusted[t], upon petition or information, grants a
[306] commission in nature of the writ *de idiota inquirendo*, to inquire into the party's state of mind; and if he be found *non compos*, he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his committee. However, to prevent sinister practices, the next heir is seldom permitted to be this committee of the person; because it is his interest that the party should die. But it hath been said, there lies not the same objection against his next of kin, provided he be not his heir; for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings, which he or his family may hereafter be entitled to enjoy[u]. The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition: accountable however to the court of chancery, and to the *non compos* himself, if he recovers; or otherwise to his administrators[25].

In this care of idiots and lunatics the civil law agrees with ours; by assigning them tutors to protect their persons, and curators to manage their estates. But in another instance the Roman law goes much beyond the English. For, if a man by notorious prodigality was in danger of wasting his estate, he was looked upon as *non compos*, and committed to

[t] 3 P. Wms. 108.

[u] 2 P. Wms. 638.

(25) This rule, that the next of kin of a lunatic, if entitled to his estate upon his death, must not be committee of the person, has long ceased to be adhered to. (7 Ves. 591). If no one will accept the office of committee, a receiver of the lunatic's estate must be appointed, with a salary, but who should be considered as committee, and give proper security as such. (10 Ves. 622; 1 J. & W. 639).

The act 3 & 4 Wm. 4, c. 36, diminishes the inconvenience and expense of commissions in the nature of writs *de lunatico inquirendo*, and provides for the better care and treatment of idiots, lunatics, and persons found by inquisition to be of unsound mind; and 5 & 6 Vict. c. 84, still further amends the practice and course of proceedings under such commissions.

the care of curators or tutors by the prætor [v]. And by the laws of Solon such prodigals were branded with perpetual infamy [w]. But with us, when a man on an inquest of idiocy hath been returned an *unthrift*, and not an *idiot* [x], no farther proceedings have been had. And the propriety of the practice itself seems to be very questionable. It was doubtless an excellent method of benefitting the individual, and of preserving estates in families; but it hardly seems calculated for the genius of a free nation, who claim and exercise the liberty of using their own property as they please. "*Sic utere tuo, ut alienum non lædas*," is the only restriction our laws [307] have given with regard to economical prudence. And the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance somewhere, are perhaps not a little conducive towards keeping our mixed constitution in its due health and vigour.

II. King's extraordinary revenue.

This may suffice for a short view of the king's *ordinary* revenue, or the proper patrimony of the crown; which was very large formerly, and capable of being increased to a magnitude truly formidable: for there are very few estates in the kingdom, that have not, at some period or other since the Norman conquest, been vested in the hands of the king by forfeiture, escheat, or otherwise. But fortunately for the liberty of the subject, this hereditary landed revenue, by a series of improvident management, is sunk almost to nothing; and the casual profits, arising from the other branches of the *census regalis*, are likewise almost all of them alienated from the crown. In order to supply the deficiencies of which, we are now obliged to have recourse to new methods of raising money, unknown to our early ancestors; which methods constitute the king's *extraordinary* revenue. For, the public patrimony being got into the hands of private subjects, it is but reasonable that private contributions should supply the public service. Which, though it may perhaps fall harder upon some individuals, whose ancestors have had no share in the general plunder, than upon others, yet taking the

[v] *Solent prætores, si talem hominem invenerint, qui neque tempus neque finem expensarum habet, sed bona sua dilacerando et dissipando profundit, curatorem ei dare, exemplo furiosi: et tamdiu erunt ambo in cvratione, quamdiu vel furiosus sanitatem, vel ille bonos mores, receperit.* Ff. 27, 10, 6, 16.

[w] Potter Antiq. b. 1, c. 26.

[x] Bro. Abr. tit. Idiot, 4.

nation throughout, it amounts to nearly the same; provided the gain by the extraordinary should appear to be no greater than the loss by the ordinary revenue. And, perhaps, if every gentleman in the kingdom was to be stripped of such of his lands as were formerly the property of the crown; was to be again subject to the inconveniences of purveyance and preemption, the oppression of forest laws, and the slavery of feodal tenures; and was to resign into the king's hands all his royal franchises of waifs, wrecks, estrays, treasure-trove, mines, deodands, forfeitures, and the like; he would find himself a greater loser, than by paying his *quota* to such taxes as are necessary to the support of the government.

[308] The thing therefore to be wished and aimed at in a land of liberty is by no means the total abolition of taxes, which would draw after it very pernicious consequences, and the very supposition of which is the height of political absurdity. For as the true idea of government and magistracy will be found to consist in this, that some few men are deputed by many others to preside over public affairs, so that individuals may the better be enabled to attend their private concerns; it is necessary that those individuals should be bound to contribute a portion of their private gains, in order to support that government, and reward that magistracy which protects them in the enjoyment of their respective properties. But the things to be aimed at are wisdom and moderation, not only in granting, but also in the method of raising the necessary supplies; by contriving to do both in such a manner as may be most conducive to the national welfare, and at the same time most consistent with economy and the liberty of the subject; who, when properly taxed, contributes only, as was before observed[y], some part of his property, in order to enjoy the rest.

Of aids, subsidies, and supplies voted by the commons.

These extraordinary grants are usually called by the synonymous names of aids, subsidies, and supplies; and are granted, as we have formerly seen[z], by the commons of Great Britain in parliament assembled: who, when they have voted a supply to his majesty, and settled the *quantum* of that supply, usually resolve themselves into what is called *a committee of ways and means*, to consider the ways and means of raising the supply so voted. And in this committee every

[y] Page 281. [z] Page 169.

member (though it is looked upon as the peculiar province of the chancellor of the exchequer) may propose such scheme of taxation as he thinks will be least detrimental to the public. The resolutions of this committee, when approved by a vote of the house, are in general esteemed to be (as it were) final and conclusive. For, though the supply cannot be actually raised upon the subject till directed by an act of the whole parliament, yet no monied man will scruple to [309] advance to the government any quantity of ready cash, on the credit of a bare vote of the house of commons, though no law be yet passed to establish it.

The taxes, which are raised upon the subject, are either annual or perpetual. The usual annual taxes are those upon land and malt[26]. Are annual or perpetual. The annual are,

I. The land-tax, in its modern shape, has superseded all the former methods of rating either property, or persons in respect of their property, whether by tenths or fifteenths, subsidies on land, hydages, scutages, or talliages; a short explication of which will however greatly assist us in understanding our ancient laws and history. I. Land-tax, in lieu of

Tenths, and fifteenths[a], were temporary aids issuing out of personal property, and granted to the king by parliament. They were formerly the real tenth or fifteenth part of all the moveables belonging to the subject; when such moveables, or personal estates were a very different and a much less considerable thing than what they usually are at this day. Tenths are said to have been first granted under Henry the Second, who took advantage of the fashionable zeal for croisades to introduce this new taxation, in order to defray the expense of a pious expedition to Palestine, which he really or seemingly had projected against Saladine emperor of the Saracens; whence it was originally denominated the Saladine tenth[b]. But afterwards fifteenths were more usually granted than tenths. Originally the amount of these taxes was uncertain, being levied by assessments new made at every fresh tenths, and fifteenths,

[a] 2 Inst. 77; 4 Inst. 34.

[b] Hoved. A.D. 1188; Carte. 1, 719; Hume, 1, 329.

(26) Both these taxes have, since the time of Blackstone, been made perpetual. (Vide infra, notes 30 & 31, p. 313).

grant of the commons, a commission for which is preserved by Matthew Paris[c]: but it was at length reduced to a certainty in the eighth year of Edward III., when, by virtue of the king's commission, new taxations were made of every township, borough, and city in the kingdom, and recorded in the
[310] exchequer: which rate was, at the time, the fifteenth part of the value of every township, the whole amounting to about 29,000*l.* and therefore it still kept up the name of a fifteenth, when, by the alteration of the value of money and the increase of personal property, things came to be in a very different situation. So that when, of later years, the commons granted the king a fifteenth, every parish in England immediately knew their proportion of it; that is, the same identical sum that was assessed by the same aid in the eighth of Edward III.; and then raised it by a rate among themselves, and returned it into the royal exchequer.

scutages on knights' fees,

The other ancient levies were in the nature of a modern land-tax: for we may trace up the original of that charge as high as to the introduction of our military tenures[d]; when every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in every year. But this personal attendance growing troublesome in many respects, the tenants found means of compounding for it, by first sending others in their stead, and in process of time by making a pecuniary satisfaction to the crown in lieu of it. This pecuniary satisfaction at last came to be levied by assessment, at so much for every knight's fee, under the name of scutages; which appear to have been levied for the first time in the fifth year of Henry the Second, on account of his expedition to Toulouse, and were then (I apprehend) mere arbitrary compositions, as the king and the subject could agree. But this precedent being afterwards abused into a means of oppression (in levying scutages on the landholders by the royal authority only, whenever our kings went to war, in order to hire mercenary troops, and pay their contingent expenses), it became thereupon a matter of national complaint; and king John was obliged to promise in his *magna carta*[e], that no scutage should be imposed without the consent of the common council of the realm. This clause was indeed omitted in the charters of

[c] A.D. 1232. [d] See the second book of these Commentaries. [e] cap. 14.

Henry III., where[f] we only find it stipulated, that scutages should be taken as they were used to be in the time of king Henry the Second. Yet afterwards, by a variety of statutes under Henry I., and his grandson[g], it was provided, that the king shall not take any aids or tasks, any talliage or tax, but by the common assent of the great men and commons in parliament[27]. [311]

hydages, talliages, and subsidies.

Of the same nature with scutages upon knights' fees were the assessments of hydage upon all other lands, and of talliage upon cities and burghs[h]. But they all gradually fell into disuse upon the introduction of subsidies, about the time of king Richard II. and king Henry IV. These were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4*s.* in the pound for lands, and 2*s.* 8*d.* for goods; and for those of aliens in a double proportion. But this assessment was also made according to an ancient valuation; wherein the computation was so very moderate, and the rental of the kingdom was supposed to be so exceeding low, that one subsidy of this sort did not, according to sir Edward Coke[i], amount to more than 70,000*l.*, whereas a modern land-tax at the same rate produces two millions. It was anciently the rule never to grant more than one subsidy and two fifteenths at a time: but this rule was broken through for the first time on a very pressing occasion, the Spanish invasion in 1588; when the parliament gave queen Elizabeth two subsidies and four fifteenths. Afterwards, as money sunk in value more subsidies were given; and we have an instance in the first parliament of 1640, of the king's desiring twelve subsidies of the commons, to be levied in three years; which was looked upon as a startling proposal: though lord Clarendon says[k], that the speaker, serjeant Glanville, made it manifest to the house, how very

[f] 9 Hen. III. c. 37.
[g] 25 Edw. I. c. 5, 6; 34 Edw. I. st. 4, c. 1; 14 Edw. III. st. 2, c. 1.
[h] Madox. hist. exch. 480.
[i] 4 Inst. 33.
[k] Hist. b. 2.

(27) The statute entitled *Confirmatio Cartarum* (25 Edw. 1), is much more comprehensive and specific upon this point than the great charter of John. By sect. 6, all aids, tasks, and prises, unless by the common consent of the realm, and for the common profit thereof, are abolished, with a saving however of the ancient aids and prises due and accustomed. See also 34 Edw. 1, s. 3, and Mr. Hallam's remarks on these statutes, Con. His. i. 429.

inconsiderable a sum twelve subsidies amounted to, by telling them he had computed what he was to pay for them himself; and when he named the sum, he being known to be possessed
[312] of a great estate, it seemed not worth any farther deliberation. And indeed, upon calculation, we shall find that the total amount of these twelve subsidies to be raised in three years, is less than what is now raised in one year by a land-tax of two shillings in the pound.

The grant of scutages, talliages, or subsidies by the commons did not extend to spiritual preferments; those being usually taxed at the same time by the clergy themselves in convocation: which grants of the clergy were confirmed in parliament, otherwise they were illegal, and not binding: as the same noble writer observes of the subsidies granted by the convocation, which continued sitting after the dissolution of the first parliament in 1640. A subsidy granted by the clergy was after the rate of 4*s.* in the pound according to the valuation of their livings in the king's books: and amounted, as sir Edward Coke tells us[l], to about 20,000*l.* While this custom continued, convocations were wont to sit as frequently as parliaments: but the last subsidies, thus given by the clergy, were those confirmed by statute 15 Car. II. c. 10, since which another method of taxation has generally prevailed, which takes in the clergy as well as the laity: in recompense for which the beneficed clergy have from that period been allowed to vote at the election of knights of the shire[m]; and thenceforward also the practice of giving ecclesiastical subsidies hath fallen into total disuse.

The lay subsidy was usually raised by commissioners appointed by the crown, or the great officers of state: and therefore in the beginning of the civil wars between Charles I. and his parliament, the latter having no other sufficient revenue to support themselves and their measures, introduced the practice of laying weekly and monthly assessments[n] of a specific sum upon the several counties of the kingdom; to be levied by a pound-rate on lands and personal estates; which
[313] were occasionally continued during the whole usurpation, sometimes at the rate of 120,000*l.* a month, sometimes at

[l] 4 Inst. 33.

[m] Dalt. of sheriffs, 418; Gilb. hist. of exch. c. 4.

[n] 29 Nov.; 4 Mar. 1642.

inferior rates[o]. After the Restoration the ancient method of granting subsidies, instead of such monthly assessments, was twice, and twice only, renewed; viz. in 1663, when four subsidies were granted by the temporality, and four by the clergy: and in 1670[28], when 800,000*l.* was raised by way of subsidy, which was the last time of raising supplies in that manner. For, the monthly assessments being now established by custom, being raised by commissioners named by parliament, and producing a more certain revenue: from that time forwards we hear no more of subsidies, but occasional assessments were granted as the national emergencies required. These periodical assessments, the subsidies which preceded them, and the more ancient scutage, hydage, and talliage, were to all intents and purposes a land-tax; and the assessments were sometimes expressly called so[p]. Yet a popular opinion has prevailed, that the land-tax was first introduced in the reign of king William III.; because in the year 1692 a new assessment or valuation of estates was made throughout the kingdom: which, though by no means a perfect one, had this effect, that a supply of 500,000*l.* was equal to 1*s.* in the pound of the value of the estates given in. And according to this enhanced valuation, from the year 1693[29] to the present, a period of above fourscore years, the land-tax has continued an annual charge upon the subject; above half the time at 4*s.* in

Present land-tax act.

[o] One of these bills of assessment, in 1656, is preserved in Scobell's collection, 400.

[p] Com. Journ. 26 June; 9 Dec. 1678.

(28) The learned commentator has been misled by the title to the act (22 & 23 Car. 2, c. 3) creating this tax; which is as follows: an act to grant a subsidy to his Majesty for supply of his extraordinary occasions. (Keble's edition of the Statutes). Among many other taxes mentioned in this act, a tax of one shilling in the pound is imposed on land, but the mode of levying the tax was not similar to that of levying the true subsidy, but to that of levying a modern land-tax, and in other respects, this act was the exact forerunner of the 4 Wm. & M. c. 1, the original Land-Tax Act.

(29) The supplies annually raised during the nine years' war (from 1682 to 1693), amounted to five millions; but at the end of that war, owing partly to the decay of trade and partly to the diminution of the population (Hallam. Con. Hist. iii. 102), it was found that a great decline had taken place in the produce of the taxes. The customs had dwindled to less than half their amount before the Revolution, and the excise duties to little more than half. To this decline must be ascribed the necessity for the annual renewal of the imposition on the land, which continued from the year 1693 to 1798. (Vide next note).

the pound, sometimes at 3*s.*, sometimes at 2*s.*, twice[q] at 1*s.*, but without any total intermission. The medium has been 3*s.* 3*d.* in the pound: being equivalent with twenty-three ancient subsidies, and amounting annually to more than a million and a half of money. The method of raising it is by charging a particular sum upon each county, according to the valuation given in, *A.D.* 1692: and this sum is assessed and
[314] raised upon individuals (their personal estates, as well as real, being liable thereto) by commissioners appointed in the act, being the principal landholders of the county, and their officers[30].

II. The malt-tax.

II. The other annual tax is the malt-tax[31]; which is a sum of 750,000*l.* raised every year by parliament, ever since 1697, by a duty of 6*d.* in the bushel on malt, and a proportionable sum on certain liquors, such as cider and perry, which might otherwise prevent the consumption of malt. This is under the management of the commissioners of the excise; and is indeed itself no other than an annual excise; the nature of which species of taxation I shall presently explain; only premising at present, that in the year 1760 an additional perpetual excise of 3*d.* *per* bushel was laid upon malt; to the produce of which a duty of 15 *per cent.*, or nearly an additional halfpenny *per* bushel, was added in 1779: and that in 1763 a proportionable excise was laid upon cider and

[q] In the years 1732 and 1733.

(30) The last annual act for granting an aid to his Majesty by a land-tax, was 38 Geo. 3, c. 5. This act was amended and extended by 38 Geo. 3, c. 48, and made perpetual and subject to redemption by 38 Geo. 3, c. 60; which was amended and its provisions consolidated by 42 Geo. 3, c. 116. The consideration for redemption of the land-tax, is, with some exceptions, so much capital stock of the three per cent. consolidated annuities, or reduced annuities, as will yield a dividend exceeding the amount of the land-tax redeemed by one-tenth part thereof. This stock may be transferred by the purchaser at once, or by instalments, and in certain cases, the redemption may be made by payments in money. The land-tax acts were further amended by 53 Geo. 3, cc. 123 & 142, and new commissioners were appointed by various acts, from 31 Geo. 2, c. 7, to 1 & 2 Vict. c. 57. See also 5 & 6 Vict. c. 37, and 6 & 7 Vict. c. 24.

(31) The last annual act for granting a duty on malt, was 59 Geo. 3, c. 3. This act was repealed and other duties substituted in its place by 59 Geo. 3, c. 88; but the malt-tax was revived and made a perpetual tax by 3 Geo. 4, c. 18.

perry, but so new modelled in 1766, as scarce to be worth collecting[32].

The perpetual taxes are,

The perpetual taxes are,

I. *The customs;* or the duties, toll, tribute, or tariff, payable upon merchandise exported and imported. The considerations upon which this revenue (or the more ancient part of it, which arose only from exports) was invested in the king, were said to be two[r]; 1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him. 2. Because the king was bound of common right to maintain and keep up the ports and havens, and to protect the merchant from pirates. Some have imagined they are called with us customs, because they were the inheritance of the king by immemorial usage and the common law, and not granted him by any statute[s]: but sir Edward Coke hath clearly shewn[t], that the king's first claim to them was by grant of parliament 3 Edw. I. though the record thereof is not now extant. And indeed this is in express words confessed by statute 25 Edw. I. [315] c. 7, wherein the king promises to take no customs from merchants without the common assent of the realm, "saving to us, and our heirs, the customs on wool, skins, and leather, formerly granted to us by the commonalty aforesaid." These

I. The customs or duties on imports and exports.

[r] Dyer, 165. [s] Dyer, 43, pl. 24. [t] 2 Inst. 58, 59.

(32) In the place of the above taxes, which are no longer annual, we may now reckon the duty on property and incomes imposed by 5 & 6 Vict. c. 35, (explained and amended by 5 & 6 Vict. c. 80, and 6 & 7 Vict. c. 24), which, although limited to three years and purporting to be a temporary expedient, may hereafter, like the land and malt-tax acts, be made perpetual. By this act are imposed,—(1) a duty of 7*d.* in the pound, on all lands, tenements, and hereditaments, or heritages in Great Britain, in respect of the property thereof;—(2). a duty of 3½*d.* in the pound in England, and 2½*d.* in the pound in Scotland, on all lands, tenements, and hereditaments therein respectively situated, in respect of the occupation thereof;—(3). a duty of 7*d.* in the pound upon all profits arising from annuities, dividends, and shares of annuities payable out of any public revenue;—(4). a duty of 7*d.* in the pound upon the annual profits or gains arising or accruing from any kind of property whatsoever, whether situate in Great Britain or elsewhere, or from any profession, trade, employment, or vocation; and—(5). a duty of 7*d.* in the pound upon the annual amount of any public office or employment of profit, and upon every annuity or stipend payable by her Majesty, or out of the public revenue, except annuities before charged under class (3).

For the mode of raising and the exemptions to this tax, reference must be made to the act itself.

were formerly called the hereditary customs of the crown; and were due on the exportation only of the said three commodities, and of none other: which were styled the *staple* commodities of the kingdom, because they were obliged to be brought to those ports were the king's staple was established, in order to be there first rated, and then exported[u]. They were denominated in the barbarous Latin of our ancient records, *custuma*[v]; not *consuetudines*, which is the language of our law whenever it means merely usages. The duties on wool, sheep-skins, or woolfells, and leather, exported, were called *custuma antiqua sive magna:* and were payable by every merchant, as well native as stranger; with this difference, that merchant-strangers pay an additional toll, viz. half as much again as was paid by natives. The *custuma parva et nova* were an impost of 3*d.* in the pound, due from merchant-strangers only, for all commodities as well imported as exported; which was usually called the alien's duty, and was first granted in 31 Edw. I.[w 33]. But these ancient hereditary customs, especially those on wool and woolfells, came to be of little account, when the nation became sensible of the advantages of a home manufacture, and prohibited the exportation of wool by statute 11 Edw. III. c. 1.

Prisage or butlerage.

There is also another very ancient hereditary duty belonging to the crown, called the *prisage*, or *butlerage* of wines; which is considerably older than the customs, being taken notice of in the great roll of the exchequer, 8 Ric. I. still extant[x]. Prisage was a right of *taking* two tons of wine from every [316] ship (English or foreign) importing into England twenty tons or more, one before and one behind the mast; which by charter of Edward I. was exchanged into a duty of 2*s.* for every ton imported by merchant-strangers, and called butlerage, because paid to the king's butler[y 34].

[u] Dav. 9.

[v] This appellation seems to be derived from the French word *coustum*, or *coutum*, which signifies toll or tribute, and owes its own etymology to the word *cost*, which signifies price, charge, or, as we have adopted it in English, *cost*.

[w] 4 Inst. 29.

[x] Madox. hist. exch. 526, 532.

[y] Dav. 8; 2 Bulstr. 254; Stat. of Estr. 16 Edw. II. Com. Journ. 27 Apr. 1689.

(33) The alien duties were abolished by 24 Geo. 3, sess. 2, c. 16. (Vide infra, n. 36, p. 317).

(34) By 43 Geo. 3, c. 156, the treasury was empowered to purchase part of the duties of prisage and butlerage, which had been granted by Charles 2 to the ancestor of the Duke of Grafton; and a contract was accord-

Other customs payable upon exports and imports were distinguished into subsidies, tonnage, poundage, and other imposts. Subsidies were such as were imposed by parliament upon any of the staple commodities before mentioned, over and above the *custuma antiqua et magna:* tonnage was a duty upon all wines imported, over and above the prisage and butlerage aforesaid: poundage was a duty imposed *ad valorem*, at the rate of 12*d.* in the pound, on all other merchandise whatsoever; and the other imposts were such as were occasionally laid on by parliament, as circumstances and times required [z]. These distinctions are now in a manner forgotten, except by the officers immediately concerned in this department; their produce being in effect all blended together, under the one denomination of the *customs*.

By these we understand, at present, a duty or subsidy paid by the merchant, at the quay, upon all imported as well as exported commodities, by the authority of parliament; unless where, for particular national reasons, certain *rewards, bounties*, or *drawbacks* are allowed for particular exports or imports. Those of tonnage and poundage, in particular, were at first granted, as the old statutes (and particularly 1 Eliz. c. 19,), express it, for the defence of the realm, and the keeping and safeguard of the seas, and for the intercourse of merchandise safely to come into and pass out of the same. They were at first usually granted only for a stated term of years, as, for two years in 5 Ric II. [a]; but in Henry the Sixth's time, they were granted him for life by a statute in the thirty-first year of his reign: and again to Edward IV., for the term of his life also: since which time they were regularly granted to all his successors for life, sometimes at the first, sometimes at other subsequent parliaments, till the reign of Charles the

Tonnage and poundage.

[317]

[z] Dav. 11, 12. [a] Dav. 12.

ingly entered into, by which an annuity of 6870*l.* (being the average amount of the last twelve years, of the composition of 5*s.* per ton taken in lieu of the said duty), was to be secured to the duke and the heirs male of the body of his great-grand-father Henry Duke of Grafton, the said annuity, in default of such heirs reverting to the crown. This agreement was confirmed by 46 Geo. 3, c. 79. By 46 Geo. 3, c. 94, the treasury of Ireland was, in like manner, empowered to purchase the duty of prisage from the Earl of Ormond; and by 51 Geo. 3, c. 51, all compositions, duties, and other payments due for prisage and butlerage in Ireland were directed thenceforth to cease.

First; when as the noble historian expresses it [b], his ministers were not sufficiently solicitous for a renewal of this legal grant. And yet these imposts were imprudently and unconstitutionally levied and taken, without consent of parliament, for fifteen years together; which was one of the causes of those unhappy discontents, justifiable at first in too many instances, but which degenerated at last into causeless rebellion and murder. For, as in every other, so in this particular case, the king (previous to the commencement of hostilities) gave the nation ample satisfaction for the errors of his former conduct, by passing an act [c], whereby he renounced all power in the crown of levying the duty of tonnage and poundage, without the express consent of parliament; and also all power of imposition upon any merchandises whatever. Upon the Restoration this duty was granted to king Charles the Second for life, and so it was to his two immediate successors; but now by three several statutes, 9 Ann. c. 6, 1 Geo. I. c. 12, and 3 Geo. I. c. 7, it is made perpetual, and mortgaged for the debt of the public. The customs thus imposed by parliament are chiefly contained in two books of rates, set forth by parliamentary authority [d]; one signed by sir Harbottle Grimston, speaker of the house of commons in Charles the Second's time; and the other an additional one signed by sir Spencer Compton, speaker in the reign of George the First: to which also subsequent additions have been made [35].

[b] Hist. Rebell. b. 3.
[c] 16 Car I. c. 8.
[d] Stat. 12 Car. II. c. 4; 11 Geo. I. c. 7.

(35) Until the year 1787, great confusion and difficulty prevailed in the law relating to customs. Besides the duties enumerated in the above two books of rates, various others had been imposed from time to time, and the accumulation of these duties became at length a great embarrassment to commerce, as the merchant found considerable difficulty in ascertaining the amount to which he was liable. Under the first customs consolidation act (27 Geo. 3, c. 13), the collection of the customs was in some degree improved by abolishing all the duties then subsisting, and declaring the above-mentioned two books of rates to be of no authority, and substituting in their stead one single duty on each article, amounting as nearly as possible to the aggregate of all the various duties then payable thereupon, when any duty consisted of a fractional sum, the nearest integral number being charged. A systematic and uniform simplicity was at the same time introduced into the custom-house accounts, by which a more distinct view has since been obtained both of the total amount of this important branch of the revenue and of the various sources from which it is derived.

Aliens pay a larger proportion than natural subjects, which is what is now generally understood by the alien's duty; to be exempted from which is one of the principal cause of the frequent application to parliament for acts of naturalization [36].

These customs are then, we see, a tax immediately paid by the merchant, although ultimately by the consumer. And yet these are the duties felt least by the people; and, if prudently managed, the people hardly consider that they pay [318] them at all. For the merchant is easy, being sensible he does not pay them for himself; and the consumer, who really pays them, confounds them with the price of the commodity:

The 27 Geo. 3, c. 13, regulated the customs until the year 1826, when, by two acts, (6 Geo. 4, c. 105, and 7 Geo. 4, c. 48), all prior enactments were repealed; all the customs acts consolidated by 6 Geo. 4, cc. 106, 110—116. These were again repealed by 3 & 4 Wm. 4, c. 50, and re-enacted with fresh provisions by 3 & 4 Wm. 4, cc. 51—61. An annual act is now passed in every session, under the title of "An Act to amend the Laws relating to the Customs," in which all the new measures of the session are brought together, as 1 & 2 Vict. c. 113; 3 & 4 Vict. cc. 17, 19; 4 & 5 Vict. c. 29; 5 & 6 Vict. c. 47, amended c. 56, and 6 & 7 Vict. c. 84.

(36) The act 19 Hen. 7, c. 8, recites an undue exaction of the toll of scavage, and exempts "merchants, subjects of the king, and merchants denizens" from its payment; it also declares that the scavage to be taken by the mayor and sheriffs of London, shall be such only "as by our sovereign lord the king and his honourable council shall be determined to be the right and title of the mayor, sheriffs, &c." The title of the act is "Shewage, Scavage," which is explained by a note thus:—"Shewage or scavage signifies a kind of toll exacted by mayors, &c, for wares shewed or exposed to sale within their liberties." The manner in which this duty in the city of London is to be approved and levied, is more specifically pointed out by 22 Hen. 8, c. 8. By 24 Geo. 3, sess. 2, c. 16, all previously existing duties on the goods of aliens above those paid by natural born subjects were repealed, the preamble of the act reciting that such duties had "become an unnecessary burden upon commerce without producing any real advantage to the public revenue." Nevertheless, the very next clause continues the duties of package and scavage; and the 3rd section, "the better to prevent the mayor and commonalty from being fraudulently injured," requires every merchant to declare in his entry, and make oath if required, whether the goods he imports are on alien or British account, and the officers of customs are not permitted to allow any entry to be made, or the goods to be delivered, unless the signature or mark of the city collector appears on the face of the warrant.

The exclusion of the last-mentioned act from the general repeal effected by 6 Geo. 4, c. 105, is a singular proof of the vigilance of the corporation, and the inconsistency of the Legislature. If the corporation cannot afford to follow the liberal example of the nation by voluntarily renouncing this vexatious impost, it might be good policy in the Legislature to compensate the corporation for so doing.

in the same manner, as Tacitus observes, that the emperor Nero gained the reputation of abolishing the tax of the sale of slaves, though he only transferred it from the buyer to the seller; so that it was, as he expresses it, "*remissum magis specie, quam vi: quia cum venditor pendere juberetur, in partem pretii emptoribus accrescebat*"[e]. But this inconvenience attends it on the other hand, that these imposts, if too heavy, are a check and cramp upon trade: and especially when the value of the commodity bears little or no proportion to the quantity of the duty imposed. This in consequence gives rise also to smuggling, which then becomes a very lucrative employment: and its natural and most reasonable punishment, *viz.* confiscation of the commodity, is in such cases quite ineffectual; the intrinsic value of the goods, which is all that the smuggler has paid, and therefore all that he can lose, being very inconsiderable when compared with his prospect of advantage in evading the duty. Recourse must therefore be had to extraordinary punishments to prevent it; perhaps even to capital ones: which destroys all proportion of punishment[f], and puts murderers upon an equal footing with such as are really guilty of no natural, but merely a positive offence[37].

There is also another ill consequence attending high imposts on merchandise, not frequently considered, but indisputably certain; that the earlier any tax is laid on a commodity, the heavier it falls upon the consumer in the end: for every trader through whose hands it passes must have a profit, not only upon the raw material, and his own labour and time in preparing it, but also upon the very tax itself, which he advances to the government; otherwise he loses the use and interest of the money which he so advances. To instance in the
[319] article of foreign paper. The merchant pays a duty upon importation, which he does not receive again till he sells the commodity, perhaps at the end of three months. He is therefore equally entitled to a profit upon that duty which he pays at the custom-house, as to a profit upon the original price which he pays to the manufacturer abroad; and considers it accordingly in the price he demands of the stationer. When the stationer sells it again, he requires a profit of the

[e] Hist. l. 13. [f] Montesq. Sp. L. b. 13, c. 8.

(37) Vide ante, p. 58.

printer or bookseller upon the whole sum advanced by him to the merchant; and the bookseller does not forget to charge the full proportion to the student or ultimate consumer; who therefore does not only pay the original duty, but the profits of these three intermediate traders, who have successively advanced it for him. This might be carried much farther in any mechanical, or more complicated, branch of trade [38].

II. Directly opposite in its nature to this is the *excise duty*; which is an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the

II. The excise duties.

(38) The introduction of the warehousing system, a great and important improvement in our commercial law, is one out of many instances in which the Legislature has adopted a suggestion made by the learned commentator. Previously to 1803, the duties on most goods imported were either paid at the moment of their importation, or a bond, with sufficient security for their future payment, was given to the revenue officers. The hardships and inconveniences of such a system are numerous and obvious. (See McCulloch's Com. Dict. art. Warehousing System).

Sir Robert Walpole seems to have been one of the first who had a clear perception of its injurious influence, and the principal object of that minister's famous excise scheme, proposed in 1733, was to oblige the importers of tobacco and wine to deposit their importations in public warehouses, relieving them however, from the necessity of paying the duties chargeable on the importations, till they were withdrawn for home consumption. Sir Robert's proposed scheme, however, was met by the most violent popular clamour, and so powerful was the public delusion on the subject, that a rebellion was dreaded and the life of the minister attempted by assassination. The scheme was therefore unavoidably dropped; and although in the year 1750, Dean Tucker in his celebrated "Essay on the Comparative Advantages and Disadvantages of Great Britain and France in respect of Trade," most ably pointed out the vast benefits to be derived from a voluntary warehousing system, yet half a century elapsed before this obvious and signal improvement was sanctioned by the Legislature. This was effected by 43 Geo. 3, c. 132, but the system has been much improved and extended by subsequent statutes, the regulations of which have been embodied in the act 3 & 4 Wm. 4, c. 57, amended by 4 & 5 Wm. 4, c. 89, and 5 & 6 Wm. 4, c. 66. By 3 & 4 Wm. 4, c. 57, the commissioners of customs are empowered under the authority and direction of the lords of the treasury, to nominate the ports at which goods may be warehoused without payment of duty, and the warehouses in which particular descriptions of goods may be deposited. It also fixes the time during which goods are allowed to remain in the warehouse; and prescribes the regulations as to their removal from port to port, their sale and stowage in the warehouses, the remission of the duties in case of loss by accident, the allowances for waste, &c. If imported goods be exported from the warehouse, without being taken out of bond, no duty is payable upon them. See further 5 & 6 Vict. c. 47, ss. 49—53, and c. 56, s. 8, and 6 & 7 Vict. c. 84, ss. 16, 17.

retail sale, which is the last stage before the consumption. This is doubtless, impartially speaking, the most economical way of taxing the subject: the charges of levying, collecting, and managing the excise duties being considerably less in proportion than in other branches of the revenue. It also renders the commodity cheaper to the consumer, than charging it with customs to the same amount would do; for the reason just now given, because generally paid in a much later stage of it. But, at the same time, the rigour and arbitrary proceedings of excise laws seem hardly compatible with the temper of a free nation. For the frauds that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary, wherever it is established, to give the officers a power of entering and searching the houses of such as deal in exciseable commodities, at any hour of the day, and in many cases, of the night likewise. And the proceedings in case of transgressions are so summary and sudden, that a man may be convicted in two days' time in the penalty of many thousand
[320] pounds by two commissioners or justices of the peace; to the total exclusion of the trial by jury, and disregard of the common law [39]. For which reason, though lord Clarendon tells us [g], that to his knowledge the earl of Bedford (who was made lord treasurer by king Charles the First, to oblige

[g] Hist. b. 3.

(39) This is a little too unqualified, there being always an appeal from such summary convictions. (7 & 8 Geo. 4, c. 53, ss. 65, 84; 4 & 5 Wm. 4, c. 51; 4 & 5 Vict. c. 20, s. 26).

For the jurisdiction of the commissioners and justices of the peace in cases of excise, see Burn's Justice, tit. Excise. The grievances of the excise perhaps exist more in apprehension than in reality, and the prejudice in the public mind, to which Blackstone has alluded, against the excise duties, seems to have originated more in the regulations connected with their imposition, than in the oppressive extent to which they have sometimes been carried. The great objection to them as they at present stand, consists in their obscurity and complexity. Being intended for the guidance of traders, they ought to be brief, clear, and level to the apprehension of every one; but instead of this, they are in the last degree lengthened, contradictory, and unintelligible.

For the more easily levying the revenue of excise, England and Wales are divided into about fifty-six collections, some of which are called by the names of particular counties, others by the names of great towns. Every such collection is subdivided into several districts, within which there is a supervisor; and each district is again subdivided into out-rides and foot-walks, within each of which there is a gauger or surveying officer.

his parliament) intended to have set up the excise in England, yet it never made a part of that unfortunate prince's revenue; being first introduced on the model of the Dutch prototype, by the parliament itself after its rupture with the crown. Yet such was the opinion of its general unpopularity, that when in 1642 "aspersions were cast by malignant persons upon the house of commons, that they intended to introduce excises, the house for its vindication therein did declare, that these rumours were false and scandalous; and that their authors should be apprehended and brought to condign punishment"[h]. However, its original[i] establishment was in 1643, and its progress was gradual; being at first laid upon those persons and commodities where it was supposed the hardship would be the least perceivable, *viz.*, the makers and vendors of beer, ale, cider, and perry[k]; and the royalists at Oxford soon followed the example of their brethren at Westminster by imposing a similar duty; both sides protesting that it should be continued no longer than to the end of the war, and then be utterly abolished"[l]. But the parliament at Westminster soon after imposed it on flesh, wine, tobacco, sugar, and such a multitude of other commodities, that it might fairly be denominated general: in pursuance of the plan laid down by Mr. Prynne (who seems to have been the father of the excise), in his letter to [321] sir John Hotham[m], signifying, "that they had proceeded in the excise to many particulars, and intended to go on farther; but that it would be necessary to use the people to it by little and little." And afterwards, when the nation had been accustomed to it for a series of years, the succeeding champions of liberty boldly and openly declared "the

[h] Com. Journ. 8 Oct. 1642.

[i] The translator and continuator of Petavius's chronological history (Lond. 1659, fol.) informs us, that it was first moved for, 28 Mar. 1643, by Mr. Prynne. And it appears from the journals of the commons, that on that day the house resolved itself into a committee to consider of raising money, in consequence of which the excise was afterwards voted. But Mr. Prynne was not a member of parliament till 7 Nov. 1648; and published in 1654 "A protestation against the illegal, detestable, and oft condemned tax and extortion of excise in general." It is probably therefore a mistake of the printer for Mr. Pymme, who was intended for chancellor of the exchequer under the earl of Bedford. Lord Clar. b. 7.

[k] Com. Journ. 17 May, 1643.

[l] Lord Clar. b. 7.

[m] 30 May, 1643. Dugdale of the troubles, 120.

impost of excise to be the most easy and indifferent levy that could be laid upon the people[n]:" and accordingly continued it during the whole usurpation. Upon king Charles's return, it having then been long established, and its produce well known, some part of it was given to the crown in 12 Car. II. by way of purchase (as was before observed) for the feodal tenures and other oppressive parts of the hereditary revenue. But, from its first original to the present time, its very name has been odious to the people of England. It has nevertheless been imposed on abundance of other commodities in the reigns of king William III., and every succeeding prince, to support the enormous expenses occasioned by our wars on the continent. Thus brandies and other spirits are now excised at the distillery; printed silks and linens, at the printer's; starch and hair-powder, at the maker's; gold and silver wire, at the wire-drawer's; plate in the hands of the vendor, who pays yearly for a licence to sell it; lands and goods sold by auction, for which a pound-rate is payable by the auctioneer, who also is charged with an annual duty for his licence; and coaches, and other wheel-carriages, for which the occupier is excised, though not with the same circumstances of arbitrary strictness as in most of the other instances. To these we may add coffee and tea, chocolate and cocoa paste, for which the duty is paid by the retailer; all artificial wines, commonly called sweets; paper and pasteboard, first when made, and again if stained or printed; malt, as before mentioned; vinegars; and the manufacture of glass; for all which the duty is paid by the manufacturer; hops, for which the person that gathers them is answerable; candles and soap, which are paid for at
[322] the maker's; malt liquors brewed for sale, which are excised at the brewery; cider and perry, at the vendor's; and leather and skins, at the tanner's:—a list which no friend to his country would wish to see farther increased[40].

[n] Ord. 14 Aug. 1649, c. 50; Scobel. 72; Stat. 1656, c. 19; Scobel. 453.

(40) Many additions have however been made to the list of exciseable articles, see 49 Geo. 3, c. 69; 7 & 8 Geo. 4, c. 53, and 4 & 5 Wm. 4, c. 51, by which statutes the laws relating to the collection and managoment of the revenue of excise throughout Great Britain and Ireland were consolidated and amended; see also Chitty's Burn's Justice, and 4 & 5 Vict. c. 20.

III. I proceed therefore to a third duty, namely, that upon salt; which is another distinct branch of his majesty's extraordinary revenue, and consists in an excise of 3*s.* 4*d.* per bushel imposed upon all salt, by several statutes of king William and other subsequent reigns. This is not generally called an excise, because under the management of different commissioners: but the commissioners of the salt duties have by statute 1 Ann. c. 21, the same powers, and must observe the same regulations, as those of other excises. This tax had usually been only temporary; but by statute 26 Geo. II. c. 3, was made perpetual[41]. III. Duty on salt.

IV. Another very considerable branch of the revenue is levied with greater cheerfulness, as, instead of being a burden, it is a manifest advantage to the public. I mean the post-office, or duty for the carriage of letters. As we have traced the original of the excise to the parliament of 1643, so it is but justice to observe that this useful invention owes its first legislative establishment to the same assembly. It is true, there existed post-masters in much earlier times: but I apprehend their business was confined to the furnishing of post-horses to persons who were desirous to travel expeditiously, and to the dispatching of extraordinary pacquets upon special occasions. King James I. originally erected a post-office under the control of one Matthew de Quester or de l'Equester, for the conveyance of letters to and from foreign parts; which office was afterwards claimed by Lord Stanhope[o], but was confirmed and continued to William Frizell and Thomas Witherings by king Charles I., *A.D.* 1632, for the better accommodation of the English merchants[p]. In 1635 the same prince erected a letter-office for England and Scotland, under the direction of the same Thomas Witherings, and settled certain rates of postage[q]: but this extended only to a few of the principal roads, the times of carriage were uncertain, and the post-mas- IV. Post office duty. [323]

[o] Latch. Rep. 87. [p] 19 Rym. Feod. 585.
[q] Ibid. 650. 20 Rym. 192.

(41) The 5 Geo. 4, c. 65, abolished both the excise and customs duty on salt; but by 6 Geo. 4, c. 105, so much of 5 Geo. 4, as related to the customs upon salt was repealed; but by 6 Geo. 4, c. 111, it was allowed to be imported duty free. See also the other customs acts to 5 & 6 Vict. c. 47.

ters on each road were required to furnish the mail with horses at the rate of $2\frac{1}{2}d.$ a mile. Witherings was superseded, for abuses in the execution of both his offices, in 1640; and they were sequestered into the hands of Philip Burlamachy, to be exercised under the care and oversight of the king's principal secretary of state[r]. On the breaking out of the civil war, great confusions and interruptions were necessarily occasioned in the conduct of the letter-office. And about that time the outline of the present more extended and regular plan seems to have been conceived by Mr. Edmond Prideaux, who was appointed attorney general to the commonwealth after the murder of king Charles. He was chairman of a committee in 1642 for considering what rates should be set upon inland letters[s]; and afterwards appointed post-master by an ordinance of both the houses[t], in the execution of which office he first established a *weekly* conveyance of letters into *all* parts of the nation[u]; thereby saving to the public the charge of maintaining post-masters to the amount of 7000*l. per annum.* And, his own emoluments being probably very considerable, the common council of London endeavoured to erect another post-office in opposition to his; till checked by a resolution of the house of commons[w], declaring that the office of post-master is and ought to be in the sole power and disposal of the parliament. This office was afterwards farmed by one Manley in 1654[x]. But, in 1657, a regular post-office was erected by the authority of the protector and his parliament[42], upon nearly the same model as has been ever since adopted, and with the same rates of postage as continued till the reign
[324] of queen Anne[y]. After the Restoration a similar office, with some improvements, was established by statute 12 Car. II.

[r] 20 Rym. 429.
[s] Com. Journ. 28 Mar. 1642.
[t] Ibid. 7 Sept. 1644.
[u] Ibid. 21 Mar. 1649.
[w] Ibid. 21 Mar. 1649.
[x] Scobell, 358.
[y] Com. Journ. 9 June, 1657. Scobell, 511.

(42) The preamble of the ordinance of Cromwell states that establishing one general post-office, besides the benefit to commerce, and the convenience of conveying public dispatches, "will be the best means to discover and prevent many dangerous and wicked designs against the Commonwealth." And it would seem that the policy of having the correspondence of the kingdom under the inspection of government is still continued; for, by a warrant from one of the principal secretaries of state, letters may be detained and opened. (9 Anne, c. 10, s. 40).—[CHRISTIAN].

c. 35, but the rates of letters were altered, and some farther regulations added by the statutes 9 Ann. c. 10, 6 Geo. I. c. 21, 26 Geo. II. c. 12, 5 Geo. III. c. 25, and 7 Geo. III. c. 50, and penalties were enacted, in order to confine the carriage of letters to the public office only, except in some few cases: a provision which is absolutely necessary; for nothing but an exclusive right can support an office of this sort: many rival independent offices would only serve to ruin one another. The privilege of letters coming free of postage, to and from members of parliament, was claimed by the house of commons in 1660, when the first legal settlement of the present post-office was made[z]; but afterwards dropped[a] upon a private assurance from the crown that this privilege should be allowed the members[b]. And accordingly a warrant was constantly issued to the post-master-general[c], directing the allowance thereof to the extent of two ounces in weight; till at length it was expressly confirmed by statute 4 Geo. III. c. 24; which adds many new regulations, rendered necessary by the great abuses crept into the practice of franking: whereby the annual amount of franked letters had gradually increased, from 23,600*l.* in the year 1715, to 170,700*l.* in the year 1763[d]. There cannot be devised a more eligible method than this, of raising money upon the subject; for therein both the government and the people find a mutual benefit. The government acquires a large revenue, and the people do their business with greater ease, expedition, and cheapness, than they would be able to do if no such tax (and of course no such office) existed[43].

[z] Com. Journ. 17 Dec. 1660.
[a] Ibid. 22 Dec. 1660.
[b] Ibid. 16 Apr. 1735.
[c] Ibid. 26 Feb. 1734.
[d] Ibid. 28 Mar. 1764.

(43) In the year 1837, the laws relating to the post-office were amended by several statutes. By 7 Wm. 4 and 1 Vict. c. 33, the exclusive privilege of conveying letters was vested in the post-master-general, except letters delivered by a friend or a special messenger, commissions, writs, affidavits, invoices, &c. Carriers, coach-drivers, guards, seamen, &c. were also specially prohibited from carrying letters whether with or without hire, and various other provisions made for the regulation and management of the officers, tolls, accounts, &c. of the post-office. By 7 Wm. 4, and 1 Vict. c. 36, the laws relating to offences against the post-office laws and their judicial administration were regulated. As to the conveyance of letters in the Mediterranean and other foreign places, see 1 & 2 Vict. c. 97, and as to the conveyance of the inland mails by railway, see 1 & 2 Vict. c. 98. The rates or duties of postage on domestic and foreign letters were regulated by 7 Wm. 4, and 1 Vict.

V. Stamp duties.

V. A fifth branch of the perpetual revenue consists in the stamp duties, which are a tax imposed upon all parchment and paper, whereon any legal proceedings, or private instruments of almost any nature whatsoever, are written; and also upon licenses for retailing wines, letting horses to hire, and for
[325] certain other purposes: and upon all almanacks, newspapers, advertisements, cards, dice, and pamphlets containing less than six sheets of paper. These imposts are very various, according to the nature of the thing stamped, rising gradually from a penny to ten pounds. This is also a tax, which, though in some instances it may be heavily felt, by greatly increasing the expense of all mercantile as well as legal proceedings, yet (if moderately imposed) is of service to the public in general, by authenticating instruments, and rendering it much more difficult than formerly to forge deeds of any standing; since, as the officers of this branch of the revenue vary their stamps frequently, by marks perceptible to none but themselves, a man that would forge a deed of king William's time must know and be able to counterfeit the stamp of that date also. In France and some other countries the duty is laid on the contract itself, and not on the instrument in which it is contained (as, with us too, besides the stamps on the indentures, a tax is laid by statute 8 Ann. c. 9, of 6*d.* in the pound upon every apprentice-fee, if it be 50*l.* or under; and 1*s.* in the pound, if it be a greater sum); but this tends to draw the subject into a thousand nice disquisitions and disputes concerning the nature of his contract, and whether taxable or not; in which the farmers of the revenue are sure to have the advantage [e]. Our general method answers the purposes of the state as well,

[e] Sp. of L. b. xiii. c. 9.

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c. 34, such rates varying according to the distance. But by 2 & 3 Vict. c. 52, amended and made perpetual by 3 & 4 Vict. c. 96, the rates of inland postage on letters were reduced to one uniform rate of one penny charged on every letter not exceeding half an ounce in weight with a proportionate increase for greater weights; the parliamentary privilege of franking being also abolished, and official franking strictly regulated. By the former of these acts, parliament, moreover, pledged itself to make good any deficiency of revenue which might be occasioned by such alteration of the rates of existing duties; and by the latter, various provisions were made regulating the postage duties on ship or foreign letters, postage covers or stamps, money orders, the registry of letters, the conveyance of newspapers, &c.

and consults the ease of the subject much better. The first institution of the stamp duties was by statute 5 & 6 Wm. & M. c. 21, and they have since in many instances been increased to ten times their original amount[44].

VI. Duty on houses and windows.

VI. A sixth branch is the duty upon houses and windows. As early as the Conquest mention is made in domesday book of fumage or fuage, vulgarly called smoke farthings; which were paid by custom to the king for every chimney in the house. And we read that Edward the black prince (soon after his successes in France), in imitation of the English custom, imposed a tax of a florin upon every hearth in his French dominions[f]. But the first parliamentary establishment of it in England was by statute 13 & 14 Car. II. c. 10, whereby an hereditary revenue of 2*s.* for every hearth, in all houses

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[f] Mod. Un. Hist. xxiii. 463; Spelm. Gloss. tit. Fuage.

(44) This most fruitful source of revenue has been so frequently submitted to parliamentary regulation, that the mere enumeration of the statutes relating to it would occupy several pages. By 44 Geo. 3, c. 98, all the former acts relating to stamp duties on deeds and other instruments for the transfer of property were consolidated. This statute was amended by 55 Geo. 3, c. 184, the General Stamp Act, the schedules of which contain an enumeration of all instruments for transferring or charging property which are invalid unless stamped. Several more recent statutes have remodeled others of the stamp duties and added to the number of articles upon which stamp duties are imposed. For the stamps on indentures of apprenticeship, see 8 Anne, c. 9; 20 Geo. 2, c. 45, and 5 Geo. 3, c. 46; on articles of clerkship, 34 Geo. 3, c. 14, and 48 Geo. 3, c. 149; on attornies' certificates, 25 Geo. 3, c. 80, amended by 37 Geo. 3, c. 90; 39 & 40 Geo. 3, c. 72; 44 Geo. 3, c. 59, and 54 Geo. 3, c. 144; on bills and notes, 31 Geo. 3, c. 25, and 48 Geo. 3, c. 149; on cards and dice, 9 Geo. 4, c. 18; on conveyancers and pleaders, 44 Geo. 3, c. 98, amended by 9 Geo. 4, c. 41; on donations and presentations and on copyright designs, 5 & 6 Vict. c. 79, and 6 & 7 Vict. c. 72; on marine insurances, 39 & 40 Geo. 3, c. 72, and 54 Geo. 3, cc. 133, 144; on medicines, 42 Geo. 3, c. 56, amended by 43 Geo. 3, c. 73; on pawnbrokers' licenses, 25 Geo. 3, c. 51; on probates, 44 Geo. 3, c. 98; 48 Geo. 3, c. 149; 53 Geo. 3, c. 108, and 56 Geo. 3, 107; on receipts, 31 Geo. 3, c. 25; 35 Geo. 3, c. 55; 43 Geo. 3, c. 126, and 50 Geo. 3, c. 35. (See also Hulme's edition of Chitty's Treatise on the Stamp Laws). On the other hand, by 5 Geo. 4, c. 41, the stamp duties payable on proceedings in courts of law and equity and in the admiralty and ecclesiastical courts were repealed, as were those on pamphlets by 3 & 4 Wm. 4, c. 23, and on almanacks by 4 & 5 Wm. 4, c. 57. Those on newspapers and advertisements were considerably reduced by 3 & 4 Wm. 4, c. 23, and further regulated by 6 & 7 Wm. 4, c. 76.

The commissioners of stamps and taxes now form one board; see 4 & 5 Wm. 4, c. 60, ss. 8, 10, and 5 & 6 Wm. 4, c. 20, s. 2.

paying to church and poor, was granted to the king for ever. And, by subsequent statutes for the more regular assessment of this tax, the constable and two other substantial inhabitants of the parish, to be appointed yearly (or the surveyor, appointed by the crown, together with such constable or other public officer), were, once in every year, empowered to view the inside of every house in the parish. But, upon the Revolution, by statute 1 Wm. & M. st. 1, c. 10, hearth-money was declared to be "not only a great oppression to the poorer sort, but a badge of slavery upon the whole people, exposing every man's house to be entered into, and searched at pleasure, by persons unknown to him; and therefore to erect a lasting monument of their majesties' goodness in every house in the kingdom, the duty of hearth-money was taken away and abolished." This monument of goodness remains among us to this day: but the prospect of it was somewhat darkened, when in six years afterwards by statute 7 Wm. III. c. 18, a tax was laid upon all houses (except cottages) of 2*s.* now advanced to 3*s.* *per annum*, and a tax also upon all windows, if they exceeded nine, in such house. Which rates have been from time to time[g] varied, being now extended to all windows exceeding six; and power is given to surveyors, appointed by the crown, to inspect the outside of houses, and also to pass through any house two days in the year, into any court or yard, to inspect the windows there. A new duty from 6*d.* to 1*s.* in the pound was also imposed by statutes 18 Geo. III. c. 26, and 19 Geo. III. c. 59, on every dwelling-house inhabited, together with the offices and gardens therewith occupied: which duty, as well as the former, is under the direction of the commissioners of the land-tax[45].

[g] Stat. 20 Geo. II. c. 3; 31 Geo. II. c. 22; 2 Geo. III. c. 8; 6 Geo. III. c. 38.

(45) The window-tax was much increased by the provisions of 24 Geo. 3, sess. 2, c. 38, and 37 Geo. 3, c. 105; twenty per cent. being added to their gross amount. It was again increased by 42 Geo. 3, c. 34; 48 Geo. 3, c. 55, and 52 Geo. 3, c. 93, but reduced one-half by 4 Geo. 4, c. 11, and further regulated by 6 Geo. 4, c. 7; 2 & 3 Wm. 4, c. 113, and 4 & 5 Wm. 4, c. 54; and lastly, an addition of ten per cent. on the window duties created by the said acts of 48 Geo. 3, c. 55, and 52 Geo. 3, c. 93, was granted by 3 & 4 Vict. c. 17, s. 8; but by sect. 12, of this act, all windows opened since the 5th of April, 1835, and exempt from duty under 4 & 5 Wm. 4, c. 54, are exempt from this addition. A house having eight windows is now liable to the payment of 16*s.* 6*d.* per annum; nine windows, 1*l.* 1*s.*; ten,

VII. The seventh branch of the extraordinary perpetual revenue is a duty of 21*s. per annum* for every male servant retained or employed in the several capacities specifically mentioned in the act of parliament, and which almost amount to an universality, except such as are employed in husbandry, trade, or manufactures. This was imposed by statute 17 Geo. III. c. 39, amended by 19 Geo. III. c. 59, and is under the management of the commissioners of the land and window-tax[46].

VII. Duty on servants.

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VIII. An eighth branch is the duty arising from licenses to hackney coaches and chairs in London, and the parts adjacent. In 1654 two hundred hackney coaches were allowed within London, Westminster, and six miles round, under the direction of the court of aldermen[h]. By statute 13 & 14 Car. II. c. 2, four hundred were licensed; and the money arising thereby was applied to repairing the streets[i]. This number was increased to seven hundred by statute 5 Wm. & M. c. 22, and the duties vested in the crown: and by the statute 9 Ann. c. 23, and other subsequent statutes for their government[j], there are now a thousand licensed coaches and four hundred chairs. This revenue is governed by commissioners of its own, and is, in truth, a benefit to the subject; as the expense of it is felt by no individual, and its necessary regulations have established a competent jurisdiction, whereby a very refractory race of men may be kept in some tolerable order[47].

VIII. Licenses on hackney coaches and chairs.

[h] Scobell, 313.
[i] Com. Journ. 14 Feb. 1661.
[j] 10 Ann. c. 19, § 158; 12 Geo. I. c. 15; 7 Geo. III. c. 44; 10 Geo. III. c. 44; 11 Geo. III. cc. 24, 28; 12 Geo. III. c. 49.

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l. 8*s.*, and so on in an increasing proportion regulated by the number of windows. Farm-houses belonging to farms under 200*l.* per annum, are altogether exempted from window duty; see 4 & 5 Wm. 4, c. 73.

The house duty went through several statutory changes in the reign of Geo. 3, and Geo. 4, (see 48 Geo. 3, c. 55; 4 Geo. 4, c. 11); but it was entirely abolished by 3 & 4 Wm. 4, c. 39.

(46) See 48 Geo. 3, c. 55, and 52 Geo. 3, c. 93. The duty on male servants is not imposed in respect of persons under eighteen years of age or having settlements in the place of service. (4 & 5 Wm. 4, c. 73, s. 2).

(47) All the above and many other statutes relating to hackney and stage carriages, waggons, carts, and drays, in and near the metropolis, were repealed in 1831. The acts now in force on this subject, are 1 & 2 Wm. 4, c. 22, and 6 & 7 Vict. c. 86, repealing 1 & 2 Vict. c. 79.

Besides the assessed taxes comprised

IX. Duty on offices and pensions.

IX. The ninth and last branch of the king's extraordinary perpetual revenue is the duty upon offices and pensions; consisting in an annual payment of 1*s.* in the pound (over and above all other duties[k]) out of all salaries, fees, and perquisites, of offices and pensions payable by the crown, exceeding the value of 100*l. per annum.* This highly popular taxation was imposed by statute 31 Geo. II. c. 22, and is under the direction of the commissioners of the land-tax[48].

[328]

How these taxes are appropriated.

The clear net produce of these several branches of the revenue, after all charges of collecting and management paid, amounts at present annually to about seven millions and three quarters sterling; besides more than two millions and a quarter raised by the land and malt-tax[49]. How these immense sums are appropriated, is next to be considered. And this is, first and principally, to the payment of the interest of the national debt.

Of the national debt.

In order to take a clear and comprehensive view of the

[k] Previous to this, a deduction of 6*d.* in the pound was charged on all pensions, and annuities, and all salaries, fees, and wages of all offices of profit granted by or derived from the crown; in order to pay the interest at the rate of three *per cent.* on one million, which was raised for discharging the debts of the civil list by statutes 7 Geo. I. st. 1, c. 27; 11 Geo. I. c. 17, and 12 Geo. I. c. 2. This million, being charged on this particular fund, is not considered as any part of the national debt.

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in the 6th, 7th, and 8th sections of the text, and in previous notes, the following have been imposed since the time of Blackstone.

1. Duties on private carriages according to the number of wheels and horses, and whether for private use or to be let for hire. See 2 & 3 Wm. 4, c. 82; 3 & 4 Wm. 4, c. 39, amended by 6 & 7 Wm. 4, c. 65, and 7 Wm. 4, and 1 Vict. c. 61.

2. Duties on hair powder and armorial bearings, on licenses to horse-dealers and gamekeepers, on game certificates, on horses for riding or drawing carriages, and on dogs. See 48 Geo. 3, c. 55; 52 Geo. 3, c. 93; 4 Geo. 4, c. 11, and 3 & 4 Vict. c. 17.

3. On licenses to dealers in game. See 1 & 2 Wm. 4, c. 32.

4. On stage-coaches, both by licensing and a mileage duty, and on passengers by railway. See 5 & 6 Vict. cc. 79, 80, and 6 & 7 Vict. c. 86.

The specific rates, exemptions, and other particulars of the assessed taxes are too often varied to be entitled to insertion, and are to be found in every almanack. The minutiæ of the laws relating to them are to be found in Burn's Justice, *sub voce* "Assessed Taxes." Their collection and management are under the control of "the commissioners of stamps and taxes."

(48) The duties on offices and pensions were made perpetual by 6 & 7 Wm. 4, c. 97.

(49) The total net income of the public revenue for the year ending 5th of January, 1843, was 46,965,630*l.* 7*s.* 9*d.*

nature of this national debt, it must first be premised, that after the Revolution, when our new connexions with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in maintaining long wars, as principals, on the continent for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the house of Austria, maintaining the liberties of the Germanic body, and other purposes, increased to an unusual degree: insomuch that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the state, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed: by this means converting the principal debt into a new species of property, transferable from one man to another, at any time, and in any quantity. A [329] system which seems to have had its original in the state of Florence, *A.D.* 1344: which government then owed about 60,000*l.* sterling: and being unable to pay it, formed the principal into an aggregate sum, called metaphorically a *mount* or *bank*, the shares whereof were transferable like our stocks, with interest at 5 *per cent.* the prices varying according to the exigencies of the state[1]. This policy of the English parliament laid the foundation of what is called the national debt: for a few long annuities created in the reign of Charles II. will hardly deserve that name. And the example then set has been so closely followed during the long wars in the reign of queen Anne, and since, that the capital of the national debt (funded and unfunded) amounted at the close of the session in June 1777, to about an hundred and thirty-six millions[50]: to pay the interest of which, together with certain annuities

[1] *Pro tempore, pro spe, pro commodo, minuitur eorum pretium atque augescit.* Aretin. See Mod. Un. Hist. xxxvi. 116.

(50) The capital of the funded debt of Great Britain and Ireland, on the 5th of January, 1843, amounted to 776,481,532*l.* 19*s.* 1¾*d.* besides an unfunded debt and demands then outstanding to the amount of 24,911,859*l.* 13*s.* 11*d.*, the interest and expenses of management of which for the past year amounted to 28,878,409*l.* 19*s.* 10¼*d.*

for lives and years, and the charges of management, amounting annually to upwards of four millions and three quarters, the extraordinary revenues just now enumerated (excepting only the land-tax and annual malt-tax) are in the first place mortgaged, and made perpetual by parliament. Perpetual, I say; but still redeemable by the same authority that imposed them; which, if at any time can pay off the capital, will abolish those taxes which are raised to discharge the interest.

By this means the quantity of property in the kingdom is greatly increased in idea, compared with former times; yet if we coolly consider it, not at all increased in reality. We may boast of large fortunes, and quantities of money in the funds. But where does this money exist? It exists only in name, in paper, in public faith, in parliamentary security: and that is undoubtedly sufficient for the creditors of the public to rely on. But then what is the pledge which the public faith has pawned for the security of these debts? The land, the trade, and the personal industry of the subject; from which the money must arise that supplies the several taxes. In these therefore, and these only, the property of the public creditors does really and intrinsically exist: and of course the land, the trade, and the personal
[330] industry of individuals, are diminished in their true value just so much as they are pledged to answer. If A.'s income amounts to 100*l. per annum*; and he is so far indebted to B., that he pays him 50*l. per annum* for his interest; one-half of the value of A.'s property is transferred to B. the creditor. The creditor's property exists in the demand which he has upon the debtor, and no where else; and the debtor is only a trustee to his creditor for one-half of the value of his income. In short the property of a creditor of the public consists in a certain portion of the national taxes: by how much therefore he is the richer, by so much the nation, which pays these taxes, is the poorer [51].

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(51) "It is a very erroneous notion indeed to suppose that the property of the kingdom is increased by national debts, contracted in consequence of the expenses of war. On the contrary, the principal of the debt is the exact amount of the property which the nation has lost from its capital for ever. The American war cost the nation 116 millions sterling, and the effect is precisely the same as if so much of its wealth and treasure in corn, cattle, cloth, ammunition, coin, &c. had been collected together and thrown into the

The only advantage that can result to a nation from public debts, is the increase of circulation by multiplying the cash of the kingdom, and creating a new species of currency, assignable at any time and in any quantity; always therefore ready to be employed in any beneficial undertaking, by means of this its transferable quality: and yet producing some profit even when it lies idle and unemployed. A certain proportion of debt seems therefore to be highly

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sea, besides the loss accruing from the destruction of many of its most productive hands. When this property is consumed, it never can be retrieved, though industry and care may acquire and accumulate new stores. Such a supply, by no mode of taxation that has yet been devised, could be collected at once, without exhausting the patience and endurance of the people. But by the method of funding, the subjects are induced to suppose, that their suffering consists only in the payment of the yearly interest of this immense waste. The ruin is completed before the interest commences, for that is paid by the nation, to the nation, and returns back to its former channel and circulation; like the balls in a tennis court, however they may be tossed from one side to the other, their sum and quantity, within the court, continue the same. 'The extravagance of individuals naturally suggested the system of funding the public debts. When a man cannot satisfy the immediate demands of his creditor, it is an obvious expedient to give him a promissory note to pay him at a future day, with interest for the time; and if this is an assignable note, so that the creditor may be enabled to persuade another to advance him the principal and to stand in his place, it is exactly similar to the debts or securities of government, except that, in general, they are not payable at any definite time. All debts, when no effects remain, both in public and private, are certain evidence of the waste and consumption of so much property, which nothing can restore, though frugality and industry may alleviate the future consequences. When a debt is contracted, a man is not richer for paying it; if he owes one hundred pounds, and pays interest for it, he is in no degree richer by calling in one hundred pounds from which he receives the same interest, and therewith discharges the debt; but probably, if he does so, he will feel himself more comfortable and independent, and will find his credit higher, if his occasions should oblige him to borrow in future. So it is with governments; when the debt is contracted, and the money spent, the mischief is done; the discharge of the debt can add nothing (or little comparatively) immediately to the stock or capital of the nation. But yet these important consequences may be expected from it; viz. from the abolition of taxes upon candles, soap, salt, beer, and upon a melancholy catalogue of the necessary articles of life, taxes which take from those who have nothing to spare, the price of labour would be lowered, manufactures would flourish with renewed vigour, the minds of the people would be cheered, and the nation would again have credit and spirit to meet its most formidable enemies, and to repel and resent both injury and insult. All the nations of Europe have learnt from such dear-bought experience, that poverty and misery are the inevitable consequences of war, as to give us reason to hope, that the lives and property of mankind will not, in future, be dissipated with the profusion and wantonness of former times."—[CHRISTIAN].

useful to a trading people: but what that proportion is, it is not for me to determine. Thus much is indisputably certain, that the present magnitude of our national incumbrances very far exceeds all calculations of commercial benefit, and is productive of the greatest inconveniences. For, first, the enormous taxes, that are raised upon the necessaries of life for the payment of the interest of this debt, are a hurt both to trade and manufactures, by raising the price as well of the artificer's subsistence as of the raw material, and of course, in a much greater proportion, the price of the commodity itself. Nay, the very increase of paper circulation itself, when extended beyond what is requisite for commerce or foreign exchange, has a natural tendency to increase the price of provisions as well as of all other merchandise. For, as its effect is to multiply the cash of the kingdom, and this to such an extent that much must remain unemployed, that cash (which is the universal measure of the respective values of all other commodities)
[331] must necessarily sink in its own value [m], and every thing grow comparatively dearer. Secondly, if part of this debt be owing to foreigners, either they draw out of the kingdom annually a considerable quantity of specie for the interest; or else it is made an argument to grant them unreasonable privileges, in order to induce them to reside here. Thirdly, if the whole be owing to subjects only, it is then charging the active and industrious subject, who pays his share of the taxes, to maintain the indolent and idle creditor who receives them. Lastly, and principally, it weakens the internal strength of a state, by anticipating those resources which should be reserved to defend it in case of necessity. The interest we now pay for our debts would be nearly sufficient to maintain any war, that any national motives could require. And if our ancestors in king William's time had annually paid, so long as their exigencies lasted, even a less sum than we now annually raise upon their accounts, they would in the time of war have borne no greater burdens, than they have bequeathed to and settled upon their posterity in time of peace, and might have been eased the instant the exigence was over.

The respective produces of the several taxes before men-

[m] See page 276.

tioned were originally separate and distinct funds; being securities for the sums advanced on each several tax, and for them only. But at last it became necessary, in order to avoid confusion, as they multiplied yearly, to reduce the number of these separate funds, by uniting and blending them together; superadding the faith of parliament for the general security of the whole. So that there are now only three capital funds of any account, the *aggregate* fund, and the *general* fund, so called from such union and addition; and the *South Sea* fund, being the produce of the taxes appropriated to pay the interest of such part of the national debt as was advanced by that company and its annuitants. Whereby the separate funds, which were thus united, are become mutual securities for each other; and the whole produce of them, thus aggregated, liable to pay such interest or annuities as were formerly charged upon each distinct fund; the faith of the legislature being moreover engaged to supply any casual deficiencies [52].

Of the sinking fund.

[332]

The customs, excises, and other taxes, which are to support these funds, depending on contingencies, upon exports, imports, and consumptions, must necessarily be of a very uncertain amount: but though some of them have proved unproductive, and others deficient, the sum total hath always been considerably more than was sufficient to answer the charge upon them. The surplusses therefore of the three great national funds, the aggregate, general, and South Sea funds, over and above the interest and annuities charged upon them, are directed by statute 3 Geo. I. c. 7, to be carried together, and to attend the disposition of parliament; and are usually denominated the *sinking* fund, because originally destined to sink and lower the national debt. To this have been since added many other entire duties, granted in subsequent years; and the annual interest of the sums borrowed on their respective credits is charged on and payable out of the produce of the sinking fund. However, the

(52) By 27 Geo. 3, c. 13, these three funds were united together into the "consolidated fund;" and by 56 Geo. 3, c. 98, the consolidated fund of Great Britain was combined with that of Ireland, forming the consolidated fund of the United Kingdom. This fund is pledged for the payment of the interest of the consolidated national debt of the United Kingdom, besides being liable to the payment of the allowances to the royal family and the expenses of the civil government charged thereupon by 2 & 3 Wm. 4, c. 116.

neat surplusses and savings, after all deductions paid, amount annually to a very considerable sum. For as the interest on the national debt has been at several times reduced (by the consent of the proprietors, who had their option either to lower their interest or be paid their principal), the savings from the appropriated revenues came at length to be extremely large. This sinking fund is the last resort of the nation: its only domestic resource, on which must chiefly depend all the hopes we can entertain of ever discharging or moderating our incumbrances. And therefore the prudent and steady application of the large sums now arising from this fund is a point of the utmost importance, and well-worthy the serious attention of parliament; which was thereby enabled, in the year 1765, to reduce above two millions sterling of the public debt: and several additional millions in several succeeding years [53].

(53) By 20 Geo. 3, c. 31, the sum of one million annually was set apart and ordered to be laid out in the purchase of stock by commissioners appointed by the same act; it being also provided, that when this annual million should be increased to four millions by the dividends of the stock so purchased, then the dividends should no longer be paid upon the redeemed stock, and that the sinking fund should no longer accumulate. By 32 Geo. 3, c. 55, it was enacted, that when these dividends should amount to three millions, exclusive of the said annual grant, there should be no further accumulation; it being also provided, that upon every future loan which was not to be paid off within forty-five years, one per cent. should be annually appropriated to form a sinking fund for the redemption of the loan. By 33 Geo. 3, c. 22, an additional grant of 200,000*l.* was made for the same purpose, which was annually renewed until made a permanent charge on the consolidated fund by 42 Geo. 3, c. 71; by which statute also, so much of 26 Geo. 3 and 32 Geo. 3, as fixed a limit to the accumulation of the sinking fund was repealed. It was also stated in the preamble of this and many other of the sinking fund acts, that by the accumulation of the above-mentioned joint fund the whole national debt might be redeemed in forty-five years. See further 4 Geo. 4, c. 19, and 9 Geo. 4, c. 27. The principle upon which these acts were founded is now admitted to be fallacious, but the sinking fund was placed on a better foundation by 10 Geo. 4, c. 27, by which it was enacted, that the treasury shall every quarter make up accounts shewing the actual receipt and expenditure of the United Kingdom for the four preceding quarters, and one-fourth of the sum, which by every such annual account, shall appear to be the amount of the whole actual annual surplus revenue beyond the expenditure, shall be issued to the aforesaid commissioners, to be by them applied towards the redemption of the national debt. For the year ending the 5th of January, 1843, there has been no surplus revenue applicable to this purpose; but the commissioners state that the capital sum of 1,791,038*l.* 17*s.* 8*d.* is standing in their names on account of stock unclaimed for ten years

But, before any part of the aggregate fund (the surplusses whereof are one of the chief ingredients that form the sinking fund) can be applied to diminish the principal of the public debt, it stands mortgaged by parliament to raise an annual sum for the maintenance of the king's household and the civil list. For this purpose, in the late reigns, the [333] produce of certain branches of the excise and customs, the post-office, the duty on wine licenses, the revenues of the remaining crown lands, the profits arising from courts of justice (which articles include all the hereditary revenues of the crown), and also a clear annuity of 120,000*l.* in money, were settled on the king for life, for the support of his majesty's household, and the honour and dignity of the crown. And as the amount of these several branches was uncertain (though in the last reign they were computed to have sometimes raised almost a million), if they did not arise annually to 800,000*l.* the parliament engaged to make up the deficiency. But his present majesty having, soon after his accession, spontaneously signified his consent, that his own hereditary revenues might be so disposed of as might best conduce to the utility and satisfaction of the public; and having graciously accepted the limited sum of 800,000*l. per annum* for the support of his civil list, the said hereditary and other revenues were carried intō and made a part of the aggregate fund, and the aggregate fund was charged [n] with the payment of the whole annuity to the crown of 800,000*l.* which, being found insufficient, was increased in 1777 to 900,000*l. per annum* [54]. Hereby the revenues themselves, being put under the same care and management as the other branches of the public patrimony, produce more and are better collected than heretofore; and the public is still a gainer of near 100,000*l. per annum* by this disinterested

[n] Stat. 1 Geo. III. c. 1.

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or upwards, and of unclaimed dividends, and also on account of donations and bequests by private individuals applicable to the reduction of the national debt.

(54) And so it contjnued until 1804, when it was increased to 960,000*l.*, at which amount it continued till 1812; from which date until the close of the reign of Geo. 3, it was 1,030,000*l.* In addition to this, the sum of 3,398,000*l.* in the whole was granted to Geo. 3, for discharging the debts of the civil list. (Vide infra, note 57, p. 334).

conduct of his majesty [55]. The civil list, thus liquidated, together with the four millions and three quarters, interest of the national debt, and more than two millions produced from the sinking fund, make up the seven millions and three quarters *per annum*, neat money, which were before stated to be the annual produce of our *perpetual* taxes; besides the immense, though uncertain, sums arising from the *annual* taxes on land and malt, but which, at an average, may be calculated at more than two millions and a quarter; and, added to the preceding sum, make the clear produce of the taxes (exclusive of the charge of collecting), which are raised yearly on the people of this country, amount to about ten millions sterling [56].

Of the civil list.
[334]

The expenses defrayed by the civil list are those that in any shape relate to civil government; as the expenses of the royal household; the revenues allotted to the judges, previous to the year 1758; all salaries to officers of state, and every of the king's servants; the appointment to foreign ambassadors; the maintenance of the queen and royal family; the king's private expenses, or privy purse; and other very numerous outgoings, as secret service money, pensions, and

(55) Succeeding monarchs have been equally disinterested. On the accession of Geo. 4, the hereditary revenues of the crown were by 1 Geo. 4, c. 1, placed at the disposal of the House of Commons, and carried to the consolidated fund for his life, and by the same statute a revenue of 850,000*l.* in England, and 207,000*l.* in Ireland was granted to his Majesty for life. On the accession of Wm. 4, the royal revenues were again surrendered to the nation, (see 1 Wm. 4, c. 25); and the clear yearly sum of 510,000*l.* was directed to be paid out of the consolidated fund for the support of the royal household and the honour and dignity of the crown. In the next session, an act (2 & 3 Wm. 4, c. 116) was passed to relieve the civil list from many charges which had only a theoretical connection with the royal dignity and person, viz. the salaries of the judges and diplomatic salaries and pensions, all of which, together with the allowances to the numerous members of the royal family, as also the secret service money, are now charged by parliament upon the consolidated fund. On the accession of her present Majesty, it was provided by 1 Vict. c. 2, that the hereditary revenues of the crown should, as before, be carried over to the consolidated fund during the life of her Majesty; and that the consolidated fund should be charged with the payment of the yearly sum of 385,000*l.* for the support of her Majesty's household, and the honour and dignity of the crown; it being also enacted (sect. 10), that whenever the total charge on the civil list shall in any year exceed the sum of 400,000*l.*, the particulars and cause of such excess shall be laid before parliament.

(56) Vide supra, note 49, p. 328.

other bounties, which sometimes have so far exceeded the revenues appointed for that purpose, that application has been made to parliament to discharge the debts contracted on the civil list; as particularly in 1724, when one million [o] was granted for that purpose by the statute 11 Geo. I. c. 17, and in 1769 and 1777, when half a million and 600,000*l.* were appropriated to the like uses, by the statutes 9 Geo. III. c. 34, and 17 Geo. III. c. 47 [57].

The civil list is indeed properly the whole of the king's revenue in his own distinct capacity; the rest being rather the revenue of the public, or its creditors, though collected and distributed again, in the name and by the officers of the crown: it now standing in the same place as the hereditary income did formerly; and, as that has gradually diminished, the parliamentary appointments have increased. The whole revenue of queen Elizabeth did not amount to more than 600,000*l.* a year [p]; that of king Charles I. was [q] 800,000*l.*, and the revenue voted for king Charles II. was [r] 1,200,000*l.* though complaints were made (in the first years at least) that it did not amount to so much [s]. But it must be observed, that under these sums were included all manner of public expenses; among which lord Clarendon in his speech to the parliament computed, that the charge of the navy and land forces amounted annually to 800,000*l.* which was ten times more than before the former troubles [t]. The same revenue, subject to the same charges, was settled on king James II. [u]; [335]

[o] See page 328.
[p] Lord Clar. continuation, 163.
[q] Com. Journ. 4 Sept. 1660.
[r] Ibid.
[s] Ibid. 4 Jun. 1663. Lord Clar. ibid.
[t] Lord Clar. 165.
[u] Stat. 1 Jac. II. c. 1.

(57) The following sums were granted for the discharge of the civil list debts of Geo. 3.:—

1769	513,500
1777	608,300
1784	60,000
1786	210,000
1802	990,000
1804	590,000
1805	10,400
1814	218,800
1816	185,000

but by the increase of trade, and more frugal management, it amounted on an average to a million and a half *per annum* (besides other additional customs, granted by parliament[v], which produced an annual revenue of 400,000*l.*) out of which his fleet and army were maintained at the yearly expense of[w] 1,100,000*l.* After the Revolution, when the parliament took into its own hands the annual support of the forces both maritime and military[58], a civil list revenue was settled on the new king and queen, amounting, with the hereditary duties, to 700,000*l. per annum*[x]; and the same was continued to queen Anne and king George I.[y] That of king George II. we have seen, was nominally augmented to[z] 800,000*l.* and in fact was considerably more: and that of his present majesty is avowedly increased to the limited sum of 900,000*l.*[59]. And upon the whole it is doubtless much better for the crown, and also for the people, to have the revenue settled upon the modern footing rather than the ancient. For the crown, because it is more certain, and collected with greater ease;

[v] Ibid. c. 3 & 4.
[w] Com. Journ. 1 Mar., 20 Mar. 1688.
[x] Com. Journ. 14 Mar. 1701.
[y] Ibid. 17 Mar. 1701; 11 Aug. 1714.
[z] Stat. 1 Geo. II. c. 1.

(58) This great principle, that parliamentary grants may be appropriated by the parliament, and if appropriated, can only be applied by the treasury to the specified items of expenditure, was introduced in the reign of Charles 2, and with the exception of the parliament of 1685, has been universally followed by succeeding parliaments. The lords of the treasury, by a clause annually repeated in the appropriation act of every session, are forbidden, under severe penalties, to issue any warrants ordering the payment of any monies out of the exchequer, except for the purposes to which such monies had been appropriated by the parliament; the officers of the exchequer being also forbidden to obey any such warrant if issued. In time of war or when the house is apprehensive of war breaking out during the recess of parliament, it has not been very uncommon to grant considerable sums on a vote of credit, to be applied by the crown at its discretion. Mr. Hallam remarks (Con. His. iii. 159), that it is to this transference of the executive government (for the phrase is hardly too strong) from the crown to the House of Commons, that we owe the proud attitude which England has maintained in the eyes of Europe since the Revolution, so extraordinarily dissimilar to her condition under the Stuarts; the supplies, which were meted out with niggardly caution by former parliaments to sovereigns whom they could not trust, having flowed with redundant profuseness, when parliament could judge of their necessity and direct their application.

(59) Vide supra, notes 54, 55, p. 333.

for the people, because they are now delivered from the feodal hardships and other odious branches of the prerogative. And though complaints have sometimes been made of the increase of the civil list, yet if we consider the sums that have been formerly granted, the limited extent under which it is now established, the revenues and prerogatives given up in lieu of it by the crown, the numerous branches of the present royal family, and (above all) the diminution of the value of money compared with what it was worth in the last century, we must acknowledge these complaints to be void of any rational foundation, and that it is impossible to support that dignity, which a king of Great Britain should maintain, with an income in any degree less than what is now established by parliament.

The general tendency of the changes in the constitution since Car. I. has been against prerogative.

This finishes our inquiries into the fiscal prerogatives of the king; or his revenue, both ordinary and extraordinary. We have therefore now chalked out all the principal outlines of this vast title of the law, the supreme executive magistrate, or the king's majesty, considered in his several capacities and points of view. But, before we entirely dismiss this subject, it may not be improper to take a short comparative review of the power of the executive magistrate, or prerogative of the crown, as it stood in former days, and as it stands at present. And we cannot but observe, that most of the laws for ascertaining, limiting, and restraining this prerogative have been made within the compass of little more than a century past; from the petition of right in 3 Car. I. to the present time. So that the powers of the crown are now to all appearance greatly curtailed and diminished since the reign of king James the First: particularly by the abolition of the star-chamber and high commission courts in the reign of Charles the First, and by the disclaiming of martial law and the power of levying taxes on the subject by the same prince: by the disuse of forest laws for a century past; and by the many excellent provisions enacted under Charles the Second; especially the abolition of military tenures, purveyance, and pre-emption; the *habeas corpus* act; and the act to prevent the discontinuance of parliaments for above three years; and, since the Revolution, by the strong and emphatical words in which our liberties are asserted in the bill of rights, and act

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of settlement; by the act for triennial, since turned into septennial, elections; by the exclusion of certain officers from the house of commons; by rendering the seats of the judges permanent, and their salaries liberal and independent; and by restraining the king's pardon from obstructing parliamentary impeachments. Besides all this, if we consider how the crown is impoverished and stripped of all its ancient revenues, so that it must greatly rely on the liberality of parliament for its necessary support and maintenance, we may perhaps be led to think, that the balance is inclined pretty strongly to the popular scale, and that the executive magistrate has neither independence nor power enough left to form that check upon the lords and commons, which the founders of our constitution intended.

This is counterbalanced by the personal independence of the crown and its vast patronage.

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But, on the other hand, it is to be considered, that every prince, in the first parliament after his accession, has by long usage a truly royal addition to his hereditary revenue settled upon him for his life; and has never any occasion to apply to parliament for supplies, but upon some public necessity of the whole realm. This restores to him that constitutional independence, which at his first accession seems, it must be owned, to be wanting. And then, with regard to power, we may find perhaps that the hands of government are at least sufficiently strengthened; and that an English monarchy is now in no danger of being overborne by either the nobility or the people. The instruments of power are not perhaps so open and avowed as they formerly were, and therefore are the less liable to jealous and invidious reflections; but they are not the weaker upon that account. In short, our national debt and taxes (besides the inconveniences before mentioned) have also in their natural consequences thrown such a weight of power into the executive scale of government, as we cannot think was intended by our patriot ancestors, who gloriously struggled for the abolition of the then formidable parts of the prerogative, and by an unaccountable want of foresight established this system in their stead [60]. The entire collection and management of so vast a revenue, being placed in the

(60) On this subject, vide Hallam. Con. His. iii. 387, to the end of the chapter.

hands of the crown, have given rise to such a multitude of new officers created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation. Witness the commissioners and the multitude of dependents on the customs, in every port of the kingdom; the commissioners of excise, and their numerous subalterns, in every inland district; the post-masters, and their servants, planted in every town, and upon every public road; the commissioners of the stamps, and their distributors, which are full as scattered and full as numerous; the officers of the salt duty, which, though a species of excise, and conducted in the same manner, are yet made a distinct corps from the ordinary managers of that revenue; the surveyors of houses and windows; the receivers of the land-tax; the managers of lotteries; and the commissioners of hackney-coaches; all which are either mediately or immediately appointed by the crown, and removable at pleasure without any reason assigned: these, it requires but little penetration [336*] to see, must give that power, on which they depend for subsistence, an influence most amazingly extensive. To this may be added the frequent opportunities of conferring particular obligations, by preference in loans, subscriptions, tickets, remittances, and other money transactions, which will greatly increase this influence; and that over those persons whose attachment, on account of their wealth, is frequently the most desirable. All this is the natural, though perhaps the unforeseen consequence of erecting our funds of credit, and to support them establishing our present perpetual taxes: the whole of which is entirely new since the Restoration in 1660; and by far the greatest part since the Revolution in 1688. And the same may be said with regard to the officers in our numerous army, and the places which the army has created. All which put together give the executive power so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative.

But, though this profusion of offices should have no effect on individuals, there is still another newly-acquired branch of power; and that is, not the influence only, but the force of a

disciplined army: paid indeed ultimately by the people, but immediately by the crown: raised by the crown, officered by the crown, commanded by the crown. They are kept on foot, it is true, only from year to year, and that by the power of parliament: but during that year they must, by the nature of our constitution, if raised at all, be at the absolute disposal of the crown. And there need but few words to demonstrate how great a trust is thereby reposed in the prince by his people; a trust that is more than equivalent to a thousand little troublesome prerogatives.

Add to all this, that besides the civil list, the immense revenue of almost seven millions sterling, which is annually paid to the creditors of the public, or carried to the sinking fund, is first deposited in the royal exchequer, and thence
[337*] issued out to the respective offices of payment. This revenue the people can never refuse to raise, because it is made perpetual by act of parliament: which also, when well considered, will appear to be a trust of great delicacy and high importance.

Upon the whole therefore I think it is clear, that, whatever may have become of the *nominal*, the *real* power of the crown has not been too far weakened by any transactions in the last century. Much is indeed given up; but much is also acquired. The stern commands of prerogative have yielded to the milder voice of influence: the slavish and exploded doctrine of non-resistance has given way to a military establishment by law: and to the disuse of parliaments has succeeded a parliamentary trust of an immense perpetual revenue. When, indeed, by the free operation of the sinking fund, our national debts shall be lessened; when the posture of foreign affairs, and the universal introduction of a well-planned and national militia, will suffer our formidable army to be thinned and regulated; and when (in consequence of all) our taxes shall be gradually reduced; this adventitious power of the crown will slowly and imperceptibly diminish, as it slowly and imperceptibly rose. But till that shall happen, it will be our especial duty, as good subjects and good Englishmen, to reverence the crown, and yet guard against corrupt and servile influence from those who are intrusted with its authority; to be loyal, yet free; obedient, and yet independent; and, above every

thing, to hope that we may long, very long, continue to be governed by a sovereign, who, in all those public acts that have personally proceeded from himself, hath manifested the highest veneration for the free constitution of Britain; hath already in more than one instance remarkably strengthened its outworks; and will therefore never harbour a thought, or adopt a persuasion, in any the remotest degree detrimental to public liberty.

CHAPTER IX.

OF SUBORDINATE MAGISTRATES.

In a former chapter of these Commentaries[a] we distinguished magistrates into two kinds; supreme, or those in whom the sovereign power of the state resides; and subordinate, or those who act in an inferior secondary sphere. We have hitherto considered the former kind only; namely, the supreme legislative power or parliament; and the supreme executive power, which is the king: and are now to proceed to inquire into the rights and duties of the principal subordinate magistrates.

And herein we are not to investigate the powers and duties of his majesty's great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like; because I do not know that they are in that capacity in any considerable degree the object of our laws, or have any very important share of magistracy conferred upon them; except that the secretaries of state are allowed the power of commitment in order to bring offenders to trial[b]. Neither shall I here treat of the office and authority of the lord chancellor, or the other judges of the superior courts of justice; because they will find a more proper place in the third part of these Commentaries. Nor shall I enter into any minute disquisitions, with regard to the rights and dignities of mayors and aldermen, or other
[339] magistrates of particular corporations: because these are mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises. But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as are generally

[a] Ch. 2, page 146.

[b] 1 Leon. 70; 2 Leon. 175; Comb. 343; 5 Mod. 84; Salk. 347; Carth. 291.

in use, and have a jurisdiction and authority dispersedly throughout the kingdom: which are principally sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor; in treating of all which I shall inquire into, first, their antiquity and original; next, the manner in which they are appointed and may be removed; and lastly, their rights aud duties. And first of sheriffs. Sheriffs.

I. The sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, ꝛcıꝑe ȝepeꝛa, the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes*; to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls in process of time, by reason of their high employments, and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden [c]: reserving to themselves the honour, but the labour was laid on the sheriff. So that now the sheriff does all the king's business in the county; and though he be still called *vice-comes*, yet he is entirely independent of, and not subject to, the earl; the king by his letters patent [1] committing *custodiam comitatus* to the sheriff, and him alone. I. The antiquity and origin of the office.

Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which it was ordained by statute 28 Edw. I. c. 8, that the people should have election of sheriffs in every shire, where the shrievalty is not of inheritance. For anciently in some counties the sheriffs were hereditary; as I apprehend they were in Scotland till the statute 20 Geo. II. c. 43; and still continue in the county of Westmoreland to this day: the city of London having also the inheritance of the shrievalty of Middlesex vested in their body by charter [d]. The reason of these popular elections is assigned in the same statute, c. 13, "that the commons might choose such as would not be a burden to them." And herein appears plainly a strong trace of the democratical part of our The mode of appointment. [340]

[c] Dalton of sheriffs, c. 1. [d] 3 Rep. 72.

(1) Since the passing of 3 & 4 Wm. 4, c. 99, the appointment of sheriffs has been by warrant in the form set forth in the schedule to that act, made out and signed by the clerk of the privy council, instead of by letters patent under the great seal; (see sect. 3).

constitution; in which form of government it is an indispensable requisite, that the people should choose their own magistrates [e]. This election was in all probability not absolutely vested in the commons, but required the royal approbation. For in the Gothic constitution, the judges of the county courts (which office is executed by our sheriff) were elected by the people, but confirmed by the king: and the form of their election was thus managed: the people, or *incolæ territorii*, chose *twelve* electors, and they nominated *three* persons, *ex quibus rex unum confirmabat* [f]. But with us in England these popular elections, growing tumultuous, were put an end to by the statute 9 Edw. II. st. 2, which enacted, that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges; as being persons in whom the same trust might with confidence be reposed. By statutes 14 Edw. III. c. 7, 23 Hen. VI. c. 8, and 21 Hen. VIII. c. 20, the chancellor, treasurer, president of the king's council, *chief* justices, and *chief* baron, are to make this election; and that on the morrow of All Souls in the exchequer. And the king's letters patent, appointing the new sheriffs, used commonly to bear date the sixth day of November [g]. The statute of Cambridge, 12 Ric. II. c. 2, ordains that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of the peace, *sheriffs*, and other officers of the king, shall be sworn to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but such only as they shall judge to be the best and most
[341] sufficient. And the custom now is (and has been at least ever since the time of Fortescue [h], who was chief justice and chancellor to Henry the Sixth), that all the judges, together with the other great officers and privy counsellors, meet in the exchequer on the morrow of All Souls yearly (which day is now altered to the morrow of St. Martin by the last act for abbreviating Michaelmas term); and then and there the judges propose three persons, to be reported (if approved of)

[e] Montesq. Sp. L. b. 2, c. 2.
[f] Stiern. de jure Goth. l. 1, c. 3.
[g] Stat. 12 Edw. IV. c. 1.
[h] De LL. c. 24.

to the king, who afterwards appoints one of them to be sheriff [2].

This custom of the *twelve* [3] judges proposing *three* persons, seems borrowed from the Gothic constitution before mentioned; with this difference, that among the Goths the twelve nominors were first elected by the people themselves. And this usage of ours, at its first introduction, I am apt to believe was founded upon some statute, though not now to be found among our printed laws; first, because it is materially different from the direction of all the statutes before mentioned: which it is hard to conceive that the judges would have countenanced by their concurrence, or that Fortescue would have inserted in his book, unless by the authority of some statute; and also because a statute is expressly referred to in the record, which sir Edward Coke tells us [1] he transcribed from the council-book of 3 March, 34 Hen. VI., and which is in substance as follows. The king had of his own authority appointed a man sheriff of Lincolnshire, which office he refused to take upon him: whereupon the opinions of the judges were taken, what should be done in this behalf. And the two chief justices, Sir John Fortescue and sir John Pricot, delivered the unanimous opinion of them all; "that the king did an error when he made a person sheriff, that was not chosen and presented to him according to the *statute:* that the person refusing was liable to no fine for disobedience, as if he had been one of the *three* persons chosen according to the tenor of the *statute;* that they would advise the king to have recourse to the *three* persons that were chosen according to the *statute:* or that some other thrifty man be entreated to occupy the office for this year; and that, the next year, to eschew such inconveniences, the order of the *statute* in this behalf made be observed." But notwithstanding this unanimous resolution of all the judges of England, thus entered in the council-book, [342]

[1] 2 Inst. 559.

(2) In 2 T. R. 731, it was decided that where the appointment was open to no legal objection, and the appointee could offer no legal excuse for not accepting the office, it was a misdemeanor to refuse to serve. The oaths to be taken by sheriffs on their appointment are prescribed by 3 & 4 Wm. 4, c. 99, s. 6; see also 5 & 6 Wm. 4, c. 28.

(3) Now increased to fifteen, under 1 Wm. 4, c. 70, s. 1.

and the statute 34 & 35 Hen. VIII. c. 26, s. 61, which expressly recognizes this to be the law of the land, some of our writers[j] have affirmed, that the king, by his prerogative, may name whom he pleases to be sheriff, whether chosen by the judges or no. This is grounded on a very particular case in the fifth year of queen Elizabeth, when, by reason of the plague, there was no Michaelmas term kept at Westminster: so that the judges could not meet there *in crastino animarum* to nominate the sheriffs: whereupon the queen named them herself, without such previous assembly, appointing for the most part one of the two remaining on the last year's list[k]. And this case, thus circumstanced, is the only authority in our books for the making these extraordinary sheriffs. It is true, the reporter adds, that it was held that the queen by her prerogative might make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium*: but the doctrine of *non obstante's*, which sets the prerogative above the laws, was effectually demolished by the bill of rights at the Revolution, and abdicated Westminster-hall when king James abdicated the kingdom. However, it must be acknowledged, that the practice of occasionally naming what are called pocket-sheriffs, by the sole authority of the crown, hath uniformly continued to the reign of his present majesty; in which, I believe, few (if any) compulsory instances have occurred[4].

Duration of his office.

Sheriffs, by virtue of several old statutes, are to continue in their office no longer than one year: and yet it hath been said[l] that a sheriff may be appointed *durante bene placito*, or during the king's pleasure; and so is the form of the royal writ[m]. Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of the king; in which last case it was usual for the successor to send a new writ to the old sheriff[n]: but now by statute

[j] Jenkins, 229.
[k] Dyer, 225.
[l] 4 Rep. 32.
[m] Dalt. of Sheriffs, 8.
[n] Dalt. 7.

(4) Before summoning the Long Parliament, Charles I, appointed seven of the leading patriots sheriffs by prerogative, in order to prevent their being returned to parliament. See further on this subject the speech of Lord Lyndhurst to the House of Lords, on moving for an inquiry into the mode of appointing sheriffs in Ireland. (Parl. Deb. xliii. p. 990).

1 Ann. st. 1, c. 8, all officers appointed by the preceding king may hold their offices for six months after the king's demise, unless sooner displaced by the successor. We may further observe, that by statute 1 Ric. II. c. 11, no man that has served the office of sheriff for one year, can be compelled to serve the same again within three years after. [343]

His power and duty.

We shall find it is of the utmost importance to have the sheriff appointed according to law, when we consider his power and duty. These are either as a judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff.

As judge.

In his judicial capacity he is to hear and determine all causes of forty shillings value and under, in his county court, of which more in its proper place; and he has also a judicial power in divers other civil cases[o] [5]. He is likewise to decide the elections of knights of the shire (subject to the controul of the house of commons), of coroners, and of verderors; to judge of the qualification of voters [6], and to return such as he shall determine to be duly elected.

As keeper of king's peace.

As the keeper of the king's peace, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office [p]. He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the king's peace. He may, and is bound *ex officio* to pursue, and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land: and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatus*, or power of the county [q]: and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning [r],

[o] Dalt. c. 4.
[p] 1 Roll. Rep. 237.
[q] Dalt. c. 95.
[r] Lamb. Eiren. 315.

(5) Writs of inquiry under 8 & 9 W. 3, c. 11, and actions for any debt or demand not exceeding 20*l.* may now be tried before the sheriff; see 3 & 4 Wm. 4, c. 42, ss. 16, 17.

(6) This part of the sheriffs' jurisdiction has been transferred by the Reform Act to the revising barristers. (Vide supra, p. 173, n. 39).

[344] under pain of fine and imprisonment[s]. But though the sheriff is thus the principal conservator of the peace in his county, yet by the express directions of the great charter[t], he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office[u]: for this would be equally inconsistent; he being in many respects the servant of the justices.

As ministerial officer.

In his ministerial capacity the sheriff is bound to execute all process issuing from the king's courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest, and to take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution. In criminal matters, he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extend to death itself.

As king's bailiff.

As the king's bailiff, it is his business to preserve the rights of the king within his bailiwick; for so his county is frequently called in the writs; a word introduced by the princes of the Norman line, in imitation of the French, whose territory is divided into bailiwicks, as that of England into counties[w]. He must seize to the king's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures; must seize and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject; and must also collect the king's rents within his bailiwick, if commanded by process from the exchequer[x7].

[s] Stat. 2 Hen. V. c. 8.
[t] cap. 17.
[u] Stat. 1 Mar. st. 2, c. 8.
[w] Fortesc. de LL. c. 24.
[x] Dalt. c. 9.

(7) By 3 & 4 Wm. 4, c. 99, various provisions are made for the more effectual audit and passing of sheriffs' accounts; and for the more speedy return and recovery of all fines, issues, forfeited recognizances, penalties, and deodands. These accounts are no longer audited in the Exchequer, but by the Commissioners for auditing public accounts.

To execute these various offices, the sheriff has under him many inferior officers; an under-sheriff, bailiffs, and gaolers; who must neither buy, sell, nor farm their offices, on forfeiture of 500*l*[y]. [345]

The under-sheriff[8] usually performs all the duties of the office; a very few only excepted, where the personal presence of the high-sheriff is necessary. But no under-sheriff shall abide in his office above one year[z]; and if he does, by statute 23 Hen. VI. c. 8, he forfeits 200*l*., a very large penalty in those early days. And no under-sheriff or sheriff's officer shall practice as an attorney, during the time he continues in such office[a 9]: for this would be a great inlet to partiality and oppression. But these salutary regulations are shamefully evaded, by practising in the names of other attorneys, and putting in sham deputies by way of nominal under-sheriffs: by reason of which, says Dalton[b], the under-sheriffs and bailiffs do grow so cunning in their several places, that they are able to deceive, and it may well be feared that many of them do deceive, both the king, the high-sheriff, and the county. Under-sheriff.

Bailiffs, or sheriff's officers, are either bailiffs of hundreds, or special bailiffs. Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs, to collect fines therein, to summon juries, to attend the judges and justices at the assizes and quarter sessions, and also to execute writs and process in the several hundreds. But, as these are generally plain men, and not thoroughly skilful in this latter part of their office, that of serving writs, and making arrests and executions, it is now usual to join special bailiffs with them; who are generally mean persons, employed by the sheriffs on account only of their adroitness and dexterity in hunting and seizing their prey. The sheriff being answerable Bailiffs.

[y] Stat. 3 Geo. I. c. 15.
[z] Stat. 42 Edw. III. c. 9.
[a] Stat. 1 Hen. V. c. 4.
[b] Of sheriffs, c. 115.

(8) Who must be nominated by the sheriff within one month after his own appointment (3 & 4 Wm. 4, c. 99, s. 5), and to whom, by the same act, many of the judicial duties of the sheriff have been transferred.

(9) So much of 1 Hen. 5, c. 4, as provides that no under-sheriff shall be attorney in the king's courts during the time he is in office, has been repealed by 6 & 7 Vict. c. 73.

for the misdemesnors of these bailiffs [10], they are therefore usually bound in an obligation with sureties for the due
[346] execution of their office, and thence are called bound-bailiffs; which the common people have corrupted into a much more homely appellation.

Gaolers.

Gaolers are also the servants of the sheriff, and he must be responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant: and, if they suffer any such to escape, the sheriff shall answer it to the king, if it be a criminal matter; or, in a civil case, to the party injured [c]. And to this end the sheriff must have lands sufficient within the county to answer the king and his people. The abuses of gaolers and sheriff's officers, toward the unfortunate persons in their custody, are well restrained and guarded against by statute 32 Geo. II. c. 28; and by statute 14 Geo. III. c. 59, provisions are made for better preserving the health of prisoners, and preventing the gaol distemper [11].

The vast expense, which custom had introduced in serving the office of high sheriff, was grown such a burthen to the subject, that it was enacted, by statute 13 & 14 Car. II. c. 21, that no sheriff (except of London, Westmoreland, and towns which are counties of themselves), should keep any table at the assizes, except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery: yet, for the sake of safety and decency, he may not have less than twenty men in England and twelve in Wales; upon forfeiture, in any of these cases, of 200*l.*

[c] Dalt. c. 118; 4 Rep. 34.
[d] Stat. 9 Edw. II. st. 2; 2 Edw. III. c. 4; 4 Edw. III. c. 9; 5 Edw. III. c. 4.

(10) Only where their acts emanate from a special authority given by the sheriff. (7 T. R. 113; 5 B. & A. 243).

(11) These acts are for the most part repealed by 4 Geo. 4, c. 64, amended by 5 Geo. 4, cc. 84, 85, which consolidated and amended the laws relating to gaols. The raising of money for the building of gaols is provided for by 4 Geo. 4, c. 63, amended by 5 Geo. 4, c. 12, and 6 Geo. 4, c. 40, s. 5. By 5 & 6 Wm. 4, c. 38, inspectors were appointed and greater uniformity was introduced into the government of prisons; and by 1 & 2 Vict. c. 82, the prison at Parkhurst in the Isle of Wight, for the reception of young offenders was established.

II. Coroner. The antiquity and origin of the office.

II. The coroner's is also a very ancient office at the common law. He is called coroner, *coronator*, because he hath principally to do with pleas of the crown, or such wherein the king is more immediately concerned [e]. And in this light the lord chief justice of the king's bench is the principal coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm [f]. But there are also particular coroners for every county of England; usually four, but sometimes six, and sometimes fewer [g]. This officer [h] is of equal antiquity with the sheriff; and was ordained together with him to keep the peace, when the earls gave up the wardship of the county.

[347]

The mode of appointment.

He is still chosen by all the freeholders in the county court [12]; as by the policy of our ancient laws the sheriffs, and conservators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people [i]; and as verderors of the forest still are, whose business it is to stand between the prerogative and the subject in the execution of the forest laws. For this purpose there is a writ at common law *de coronatore eligendo* [k]; in which it is expressly commanded the sheriff, "*quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere.*" And in order to effect this the more surely, it was enacted by the statute [l] of Westm. I. that none but lawful and discreet knights should be chosen; and there was an instance in the 25 Edw. III. of a man being removed from this office because he was only a merchant [m]. But it seems it is now sufficient if a man hath lands enough to be made a knight, whether he be really knighted or not [n]: for the coroner ought to have an estate sufficient to maintain the dignity of his office, and answer any fines that may be set upon him for his misbehaviour [o]; and if he hath not enough to answer, his fine shall be levied on the county, as the

[e] 2 Inst. 31; 4 Inst. 271.
[f] 4 Rep. 57.
[g] F. N. B. 163.
[h] Mirror, c. 1, § 3.
[i] 2 Inst. 558.
[k] F. N. B. 163.
[l] 3 Edw. I. c. 10.
[m] 2 Inst. 32.
[n] F. N. B. 163, 164.
[o] Ibid.

(12) As to the mode of conducting the election of county coroners, see 58 Geo. 3, c. 95; and as to the coroners of boroughs, see sect. 63 of the Municipal Corporations Reform Act, 5 & 6 Wm. 4, c. 76.

punishment for electing an insufficient officer[p]? Now, indeed, through the culpable neglect of gentlemen of property, this office has been suffered to fall into direpute, and get into low and indigent hands: so that, although formerly no coroners would condescend to be paid for serving their country, and they were by the aforesaid statute of Westm. I. expressly forbidden to take a reward, under pain of a great forfeiture to the king; yet for many years past they have only desired to
[348] be chosen for the sake of their perquisites: being allowed fees for their attendance by the statute 3 Hen. VII. c. 1, which sir Edward Coke complains of heavily[q]; though since his time those fees have been much enlarged[r].

Duration of his office.

The coroner is chosen for life: but may be removed, either by being made sheriff, or chosen verderor, which are offices incompatible with the other; or by the king's writ *de coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it[s]. And by the statute 25 Geo. II. c. 29, extortion, neglect, or misbehaviour, are also made causes of removal.

His power, and duty.

The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial; but principally judicial. This is in a great measure ascertained by statute 4 Edw. I. *de officio coronatoris:* and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be "*super visum corporis*[s]:" for, if the body be not found, the coroner cannot sit[t]. He must also sit at the very place where the death happened: and his inquiry is made by a jury from four, five, or six, of the neighbouring towns, over whom he is to preside. If any be found guilty by this inquest of murder or other homicide, he is to commit them to prison for farther trial, and is also to inquire concerning their lands, goods, and

[p] Mirr. c. 1, § 3; 2 Inst. 175.

[q] 2 Inst. 210.

[r] Stat. 25 Geo. II. c. 29.

[s] F. N B. 163, 164.

[s] 4 Inst. 271.

[t] Thus, in the Gothic constitution, before any fine was payable by the neighbourhood, for the slaughter of a man therein, "*de corpore delicti constare opportebat; i. e. non tam fuisse aliquem in territorio isto mortuum inventum, quam vulneratum et cæsum. Potest enim homo etiam ex alia causa subito mori.*" Stiernhook de jure Gothor. l. 3, c. 4.

chattels, which are forfeited thereby: but, whether it be homicide or not, he must inquire whether any deodand has accrued to the king, or the lord of the franchise, by this death: and must certify the whole of this inquisition (under his own seal and the seals of his jurors [u]), together with the evidence thereon, to the court of king's bench, or the next assizes. Another branch of his office is to inquire concerning shipwrecks; and certify whether wreck or not, and who is in possession of the goods. Concerning treasure-trove, he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure; "and that may be well perceived (saith the old statute of Edw. I.) where one liveth riotously, haunting taverns, and hath done so of long time;" whereupon he might be attached, and held to bail, upon this suspicion only. [349]

The ministerial office of the coroner is only as the sheriff's substitute [13]. For when just exception can be taken to the sheriff, for suspicion of partiality (as that he is interested in the suit, or of kindred to either plaintiff or defendant), the process must be then awarded to the coroner, instead of the sheriff, for execution of the king's writs [v].

III. Justices of the peace. The antiquity and origin of the office.

III. The next species of subordinate magistrates, whom I am apt to consider, are justices of the peace; the principal of whom is the *custos rotulorum*, or keeper of the records of the county. The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. And, therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these some had, and still have, this power annexed to other offices which they hold; others had it merely by itself, and were thence named *custodes* or *conservatores pacis*. Those that were so *virtute*

[u] Stat. 33 Hen. VIII. c. 12; 1 & 2 P. & M. c. 13; 2 West. Symbol. § 310; Cromp. 264; Tremain. P. C. 621.

[v] 4 Inst. 271.

(13) And by 6 & 7 Vict. c. 83, any coroner may by writing under his hand and seal appoint any fit and proper person to act for him as a deputy, in the holding of inquests, subject however to the lord chancellor's approval of such appointment; which the coroner also may at any time revoke.

officii still continue: but the latter sort are superseded by the modern justices.

The king's majesty [w] is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept,
[350] and to punish such as break it: hence it is usually called the king's peace. The lord chancellor or keeper, the lord treasurer, the lord high steward of England, the lord mareschal, the lord high constable of England (when any such officers are in being), and all the justices of the court of king's bench (by virtue of their offices), and the master of the rolls (by prescription), are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it [x]: the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county [y]; as is also the sheriff [z]; and both of them may take a recognizance or security for the peace. Constables, tything-men, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace and commit them, till they find sureties for their keeping it [a].

The mode of appointment.

Those that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription [b]; or were bound to exercise it by the tenure of their lands [c]; or, lastly, were chosen by the freeholders in full county court before the sheriff; the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatus sui in custodes pacis* [d]." But when queen Isabel, the wife of Edward II., had contrived to depose her husband by a forced resignation of the crown, and had set up his son, Edward III. in his place; this, being a thing then without example in England, it was feared would much alarm the people: especially as the old king was living, though hurried about from castle to castle; till at last he met with an untimely death. To prevent therefore any risings, or other disturbance of the peace, the new king sent writs to all the sheriffs in England, the form of which is preserved by Thomas Walsing-

[w] Lambard, Eirenarch. 12.
[x] Lamb. 12.
[y] Britton. 3.
[z] F. N. B. 81.
[a] Lamb. 14.
[b] Ibid. 15.
[c] Ibid. 17.
[d] Ibid. 16.

'ham [e], giving a plausible account of the manner of his obtaining the crown; to wit, that it was done *ipsius patris bene placito:* and withal commanding each sheriff that the peace be kept throughout his bailiwick, on pain and peril of disinheritance and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament [f], that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers to evil, or barretors in the country, should be *assigned* to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people and given to the king [g]; this assignment being construed to be by the king's commission [h]. But still they were called only conservators, wardens, or keepers of the peace, till the statute 34 Edward III. c. 1, gave them the power of trying felonies; and then they acquired the more honourable appellation of justices [i]. [351]

These justices are appointed by the king's special commission under the great seal, the form of which was settled by all the judges, *A. D.* 1590 [j]. This appoints them all [k], jointly and separately, to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemesnors: in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence: the words of the commission running thus, "*quorum aliquem vestrum A. B. C. D. &c., unum esse volumus;*" whence the persons so named are usually called justices of the *quorum.* And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum;* but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one inconsiderable person for the sake of propriety: and no exception is now allowable, for not expressing in the form of warrants, &c., that the justice who

[e] Hist. A.D. 1327.
[f] Stat. 1 Edw. III. st. 2, c. 16.
[g] Lamb. 20.
[h] Stat. 4 Edw. III. c. 2; 18 Edw. III. st. 2, c. 2.
[i] Lamb. 23.
[j] Ibid. 43.
[k] See the form itself, Lamb. 35; Burn. tit. Justices, § 1.

[352] issued them is of the *quorum*[l][14]. When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem*, from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths to him, which done, he is at liberty to act.

Their number and qualifications.

Touching the number and qualifications of these justices; it was ordained by statute 18 Edw. III. c. 2, that *two* or *three* of the best reputation in each county, shall be assigned to be keepers of the peace. But these being found rather too few for that purpose, it was provided by statute 34 Edw. III. c. 1, that one lord, and three, or four, of the most worthy men in the county, with some learned in the law, shall be made justices in every county. But afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary by statute 12 Ric. II. c. 10, and 14 Ric. II. c. 11, to restrain them, at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be (as Lambard observed long ago[m]), that the growing number of statute laws, committed from time to time to the charge of justices of the peace, have occasioned also (and very reasonably) their increase to a larger number. And, as to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men in the county: and the statute 13 Ric. II. c. 7, orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also by statute 2 Hen. V. st. 1, c. 4, and st. 2, c. 1, they must be resident in their several counties[15]. And

[l] Stat. 26 Geo. II. c. 27. See also stat. 7 Geo. III. c. 21.
[m] Lamb. 34.

(14) By 4 Geo. 4, c. 27, amending 7 Geo. 3, c. 21, it was enacted, that in all cases where the number of justices in any city, town, or other place, is limited, and only one or more of such justices is or are of the quorum, all acts, orders, &c. of any two or more of such justices shall be valid, though neither be of the quorum.

(15) But the 28 Geo. 3, c. 49, empowers any justice of the peace for two or more adjoining counties, to act in any of them, if resident in one; but such residence must appear in the proceeding. And a justice acting for a county at large, may act within a city or precinct, being a county of itself, situate or adjoining the county at large, provided the matter do not arise within such city, &c. And the 1 & 2 Geo. 4, c. 63, empowers justices of counties, ridings, or divisions, to act within any city, town, or other pre-

because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. VI. c. 11, that no justice should be put in commission if he had not lands to the value of 20*l. per annum.* And the rate of money being greatly altered since that time, it is now enacted by statute 5 Geo, II. c. 11, that every justice, except as is therein accepted, shall have 100*l. per annum* clear of all deductions; and, if he acts without such qualification, he shall forfeit 100*l.* [16]. This qualification [n] is almost an equivalent to [353] the 20*l. per annum* required in Henry the Sixth's time: and of this [o] the justice must now make oath. Also it is provided by the act 5 Geo. II. that no practising attorney, solicitor, or proctor, shall be capable of acting as a justice of the peace [17].

[n] See bishop Fleetwood's calculations in his *chronicon pretiosum.*

[o] Stat. 18 Geo. II. c. 20.

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cinct, having exclusive jurisdiction, but not being counties themselves within such counties.

(16) By the 18 Geo. 2, c. 20, every justice of the peace must have in possession, either in law or equity, for his own use and benefit, a freehold, copyhold, or customary estate, for life, or for some greater estate, or an estate for some long term of years, determinable upon one or more life or lives, or for a certain term originally created for twenty-one years or more, in lands, tenements, or hereditaments, in England or Wales, of the clear yearly value of 100*l.* above all incumbrances, &c.; or else must be entitled to the immediate reversion or remainder of, and in such lands, &c. leased for one or more lives, or for a term determinable on the death of one or more lives, upon reserved rents of the yearly value of 300*l.*, and he must take the oath thereby prescribed of his being so qualified, and if he act without being so qualified, he is liable to a penalty of 100*l.* But by sects. 13, 14 & 15, this act shall not extend to corporation justices, peers, privy councillors, judges, the attorney and solicitor general, or Welsh judges, nor to the eldest sons or heirs apparent of peers or persons qualified to serve as knights of the shire, nor to officers of the board of green cloth, commissioners and principal officers of the navy, under-secretaries of state, or heads of colleges, nor to the mayors of Cambridge and Oxford. Nor do borough justices appointed under the Municipal Corporation Reform Act (5 & 6 Wm. 4, c. 76), need any qualification by estate; (see sect. 101).

It may be observed, that if a person act as a justice without being duly qualified, his acts are not absolutely void, but only render himself liable to the penalty. (3 B. & A. 266).

(17) So much of 5 Geo. 2, c. 18, as exclude attornies and solicitors from acting as justices of the peace, was repealed by 6 & 7 Vict. c. 73, s. 1; but by sect. 33 of the same act, this prohibition was renewed, with a proviso (sect. 34), that it should not extend to any city or town being a county of itself, or to any city, town, cinque port, or liberty, having justices of the peace within their respective limits and precincts by charter, commission, or otherwise.

As the office of these justices is conferred by the king, so it subsists only during his pleasure, and is determinable, 1. By the demise of the crown; that is, in six months after [p]. But if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh [q]: nor, by reason of any new commission, to take the oaths more than once in the same reign [r]. 2. By express writ under the great seal [s], discharging any particular person from being any longer justice. 3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it: seeing it may be revived again by another writ, called a *procedendo*. 4. By a new commission, which virtually, though silently, discharges all the former justices that are not included therein; for two commissions cannot subsist at once. 5. By accession of the office of sheriff or coroner [t]. Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission: but now [u] it is provided, that notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice.

Their power, office, duty, and liability.

The power, office, and duty of a justice of the peace depend on his commission, and on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby
[354] gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offences; which is the ground of their jurisdiction at sessions of which more will be said in its proper place. And as to the powers given to one, two, or more justices by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office; they are such and of so great importance to the public, that the country is greatly

[p] Stat. 1 Ann. c. 8.
[q] Stat. 1 Geo. III. c. 13.
[r] Stat. 7 Geo. III. c. 9.
[s] Lamb. 67.
[t] Stat. 1 Mar. st. 2, c. 8.
[u] Stat. 1 Edw. VI. c. 7.

obliged to any worthy magistrate, that without sinister views of his own will engage in this troublesome service. And therefore, if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shewn to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office[w]; which, among other privileges, prohibit such justices from being sued for any oversight, without notice beforehand; and stop all suits began, on tender made of sufficient amends. But, on the other hand, any malicious or tyrannical abuse of their office is usually severely punished: and all persons who recover a verdict against a justice, for any wilful or malicious injury, are entitled to double costs[18].

[w] Stat. 7 Jac. I. c. 5; 21 Jac. I. c. 12; 24 Geo. II. c. 44.

(18) By 24 Geo. 2, c. 44, a notice of the cause of action and intended process must be served on the magistrate, or left at his usual place of abode, one calendar month before the commencement of an action against him, for anything done by him in the execution of his office; within such month the magistrate may tender amends, &c. and plead such tender, or he may pay the money into court; the action must be brought within six calendar months, after the act complained of; and the plaintiff will not be entitled to double costs, unless the judge shall certify that the magistrate committed the injury wilfully and maliciously. On the construction of this act it has been held, that a justice is entitled to its protection where he believed himself to be acting as a justice, though what he did was not in the regular execution of his office. See further 2 Chit. Rep. 459; 9 East, 365; 3 Camp. 242; 3 M. & S. 580; 2 Pr. 126; 2 H. Bl. 114, and 1 B. & C. 13, S. C. 2 D. & R. 42. Where a justice took a fee for granting a publican's license, though it had been the custom to do so for fifty years, it was held that no notice of action was necessary. (4 D. & R. 283). Though the first section of this act in terms only authorizes a justice of the peace to pay money into the court before issue joined, yet the court will, even after issue joined, allow him to withdraw his plea, and pay money into court pleading *de novo*. See 7 Taunt. 33; 2 Marsh. 356, S. C. 3 B. & C. 159.

The 43 Geo. 3, c. 141, enacts, that in all actions against a justice, for, or on account of any conviction by him made, or for carrying such conviction into effect, in case such conviction shall have been quashed, the plaintiff shall not be entitled to recover more than the penalty levied, and two pence, without any costs, unless it be alleged in the declaration (which shall be in an action on the case only), that such acts were done maliciously, and without any reasonable or probable cause; nor shall the plaintiff be entitled to recover at all if it appear that he was guilty of the offence imputed to him, and had undergone no greater punishment than was assigned by law to such offence. This act, however, does not extend to protect justices in the execution of their office against actions of trespass or false imprisonment, unless done on account of some conviction made by them, and it seems that the statute extends to those actions only where the conviction has been quashed. See 12 East, 67, 78, 79;

It is impossible upon our present plan to enter minutely into the particulars of the accumulated authority, thus committed to the charge of these magistrates. I must therefore refer myself at present to such subsequent part of these commentaries, as will in their turns comprise almost every object of the justice's jurisdiction [19]: and in the mean time recommend to the student the perusal of Mr. Lambard's *eirenarcha*, and Dr. Burn's *justice of the peace:* wherein he will find every thing relative to this subject, both in ancient and modern practice, collected with great care and accuracy, and disposed in a most clear and judicious method.

[355] I shall next consider some officers of lower rank than those which have gone before, and of more confined jurisdiction;

16 East, 13, 21. In an action against a justice for a malicious conviction, it is not sufficient for the plaintiff to shew that he was innocent of the offence of which he was convicted, but he must also prove, from what passed before the magistrate, that there was a want of probable cause for the magistrate to convict. (1 Marsh. 220).

(19) Considerable doubts being entertained with respect to the jurisdiction of justices of the peace and recorders, they have by a recent statute (5 & 6 Vict. c. 38), been expressly excluded from trying any person for treason, murder, or capital felony, or for any felony, which, when committed by a person not previously convicted of felony is punishable by transportation for life, or for any of the following offences:—

1. Misprision of treason.
2. Offences against the queen's title, prerogative, person, or government, or against either house of parliament.
3. Offences subject to the penalties of premunire.
4. Blasphemy and offences against religion.
5. Administering or taking unlawful oaths.
6. Perjury or subornation of perjury.
7. Making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor.
8. Forgery.
9. Unlawfully and maliciously setting fire to crops, plantations, heath, &c.
10. Bigamy and offences against the laws relating to marriage.
11. Abduction of women and girls.
12. Endeavouring to conceal the birth of a child.
13. Offences against the laws relating to bankrupts or insolvents.
14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels.
15. Bribery.
16. Unlawful combinations and conspiracies, except to commit any offence, which such justices or recorder respectively have or has jurisdiction to try, when committed by one person.
17. Stealing or fraudulently taking or injuring or destroying records or documents, belonging to any court of law or equity, or relating to any proceeding therein.
18. Stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument, being or containing evidence of the title to any real estate, or any interest in lands, tenements, or hereditaments.

but still such as are universally in use through every part of the kingdom.

IV. Constables. The antiquity and origin of the office.

IV. Fourthly, then, of the constable. The word *constable* is frequently said to be derived from the Saxon koning-ꝑcapel, and to signify the support of the king. But as we borrowed the name as well as the office of constable from the French, I am rather inclined to deduce it, with sir Henry Spelman and Dr. Cowell, from that language: wherein it is plainly derived from the Latin *comes stabuli*, an officer well known in the empire: so called because, like the great constable of France, as well as the lord high constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback. This great office of lord high constable hath been disused in England, except only upon great and solemn occasions, as the king's coronation and the like, ever since the attainder of Stafford duke of Buckingham under king Henry VIII.; as in France it was suppressed about a century after by an edict of Louis XIII. [x]: but from his office, says Lambard [y], this lower constableship was at first drawn and fetched and is as it were a very finger of that hand. For the statute of Winchester [z], which first appoints them [20], directs that, for the better keeping of the peace, two constables in every hundred and franchise shall inspect all matters relating to *arms* and *armour*.

Constables are of two sorts, high constables, and petty constables [21]. The *former* were first ordained by the statute

[x] Philip's Life of Pole, ii. 111. [y] Of constables, 5.
[z] 13 Edw. I. c. 6.

(20) This is not quite correct. The office of constable existed at common law, and this statute only imposed new duties upon such officers; see Salk. 175, 380.

(21) To these may be added special constables, appointed by any two justices upon any emergencies; or upon the oath of five respectable householders that any tumult, riot, or felony is likely to take or has already taken place, in which latter cases the office is compulsory. See 1 Geo. 4, c. 37, s. 2; 1 & 2 Wm. 4, c. 41, amended by 3 & 4 Wm. 4, c. 90, and 5 & 6 Wm. 4, c. 43. In the metropolis and certain large towns, a much more efficient constabulary has been established; see 10 Geo. 4, c. 44, amended and extended by 2 & 3 Vict. c. 47, and 3 & 4 Vict. c. 84, and 2 & 3 Vict. cc. 87, 88, 95, continued by 3 & 4 Vict. c. 30, and 5 & 6 Vict. c. 117. As to the rural police, see 2 & 3 Vict. c. 93, amended and extended by 3 & 4 Vict. c. 88.

of Winchester, as before mentioned; are appointed at the court leets of the franchise or hundred over which they preside, or, in default of that, by the justices at their quarter sessions; and are removable by the same authority that appoints them [a]. The *petty* constables are inferior officers in every town and parish, subordinate to the high constable of
[356] the hundred, first instituted about the reign of Edw. III [b]. These petty constables have two offices united in them: the one ancient, the other modern. Their ancient office is that of head-borough, tithing-man, or borsholder; of whom we formerly spoke [c], and who are as ancient as the time of king Alfred; their more modern office is that of constable merely; which was appointed (as was observed) so lately as the reign of Edw. III., in order to assist the high constable [d]. And in general, the ancient head-boroughs, tithing-men, and borsholders, were made use of to serve as petty constables; though not so generally, but that in many places they still continue distinct officers from the constable. They are all chosen by the jury at the court leet; or if no court leet be held, are appointed by two justices of the peace [e].

Their power, duty, and liability.

The general duty of all constables, both high and petty, as well as of the other officers, is to keep the king's peace in their several districts; and to that purpose they are armed with very large powers, of arresting and imprisoning, of breaking open houses, and the like: of the extent of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance [22]. One of their principal duties, arising from the statute of Winchester, which appoints them, is to keep watch and ward in their respective jurisdictions. Ward guard, or *custodia*, is chiefly applied to the day-time, in order to apprehend rioters, and robbers on the highways; the manner of doing which is left to the discretion of the justices of the peace and the constable [f]: the hundred being however

[a] Salk. 150.
[b] Spelm. Gloss. 148.
[c] Page 115.
[d] Lamb. 9.
[e] Stat. 14 & 15 Car. II. c. 12.
[f] Dalt. Just. c. 104.

(22) If their powers are dangerous, they ought to be curtailed by the Legislature; but surely every officer ought to know the extent of his duty and authority.—[CHRISTIAN].

answerable for all robberies committed therein, by day-light, for having kept negligent guard. Watch is properly applicable to the night only (being called among our Teutonic ancestors *wacht* or *wacta* [g]), and it begins at the time when ward ends, and ends when that begins: for, by the statute of Winchester, [357] in walled towns the gates shall be closed from sun-setting to sun-rising, and watch shall be kept in every borough and town, especially in the summer season, to apprehend all rogues, vagabonds, and night-walkers, and make them give an account of themselves. The constable may appoint watchmen, at his discretion, regulated by the custom of the place; and these, being his deputies, have for the time being the authority of their principal [23]. But, with regard to the infinite number of other minute duties, that are laid upon constables by a diversity of statutes, I must again refer to Mr. Lambard and Dr. Burn; in whose compilations may be also seen, what powers and duties belong to the constable or tything-man indifferently, and what to the constable only: for the constable may do whatever the tithing-man may; but it does not hold *e converso*, the tithing-man not having an equal power with the constable.

V. We are next to consider the surveyors of the highways. Every parish is bound of common right to keep the high-roads, that go through it, in good and sufficient repair; unless, by reason of the tenure of lands or otherwise, this care is consigned to some particular private person. From this burthen

V. Surveyors of highways.

[g] *Excubias et explanationes quas wactas vocant.* Capitular. Hludov. Pii. c. 1, A.D. 815.

(23) A protection, similar to that provided by the Legislature for magistrates unintentionally exceeding their authority, has been provided for constables, and by the same act, viz. 24 Geo. 2, c. 44, by which it is enacted (sect. 6), that no action shall be brought against any constable or person acting by his order and in his aid, for anything done in obedience to a justice's warrant until demand has been made in writing, signed by the party or his agent, &c. intending to bring such action, of the perusal and for a copy of the warrant, and the same hath been refused or neglected to be complied with for the space of six days after such demand. But if the demand be complied with, and the constable be nevertheless sued, either with or without the justice, then in either case, upon production and proof of the warrant, the jury shall find a verdict for the constable, notwithstanding any defect of jurisdiction in the justice. And by sect. 8, no action shall be brought against any constable acting as aforesaid, but within six months after the act committed.

no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas* to which every man's estate was subject; viz. *expeditio contra hostem, arcium constructio, et pontium reparatio.* For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, *ad instructiones reparationesque itinerum et pontium, nullum genus hominum, nullisque dignitatis ac venerationis meritis, cessare oportet* [h]. And indeed now, for the most part, the care of the roads only seems to be left to parishes; that of bridges being in great measure devolved upon the county at large [24], by statute 22 Hen. VIII. c. 5. If the parish neglected these repairs, they might formerly, as they may still, be indicted for such their neglect: but it was not then incumbent on any particular officer to call the parish
[358] together, and set them upon this work; for which reason, by the statute 2 & 3 Ph. & M. c. 8, surveyors of the highways were ordered to be chosen in every parish [i].

Origin of the office.

These surveyors were originally, according to the statute of Philip and Mary, to be appointed by the constable and churchwardens of the parish; but now they are constituted by two neighbouring justices, out of such inhabitants or others as are described in statute 13 Geo. III. c. 78, and may have salaries allotted them for their trouble [25].

[h] c. 11, 74, 4.

[i] This office, Mr. Dalton (Just. cap. 50), says, exactly answers that of the *curatores viarum* of the Romans; but it should seem that theirs was an office of rather more dignity and authority than ours: not only from comparing the method of making and amending the Roman ways with those of country parishes; but also because one Thermus, who was the curator of the Flaminian way, was candidate for the consulship with Julius Cæsar. (Cic. ad Attic. l. 1, ep. 1).

(24) The county are only bound to repair bridges, which are not within any city or town corporate, or which no private person is liable by prescription or tenure to repair. This liability extends to one hundred yards along the road from each end of the bridge. See 2 E. 342; 7 E. 588; S. C. in error, 5 Taunt. 284; 2 Dow. 1; 1 B. & Ad. 289, and 14 E. 477. The jurisdiction of the court of quarter sessions over the building and repair of county bridges has been regulated by 43 Geo. 3, c. 59; 52 Geo. 3, c. 110; 54 Geo. 3, c. 90; 55 Geo. 3, c. 143, and 5 & 6 Wm. 4, c. 50, ss. 21, 22.

(25) They are now chosen annually by the inhabitants, and if the inhabitants omit to elect, the justices may appoint under the regulations prescribed by 5 & 6 Wm. 4, c. 50. See a full account of the law relating to them, under the title "Highways," in Burn's Justice of the Peace.

Their office and duty consists in putting in execution a variety of laws for the repairs of the public highways: that is, of ways leading from one town to another: all which are now reduced into one act by statute 13 Geo. III. c. 78 [26], which enacts, 1. That they may remove all annoyances in the highways, or give notice to the owner to remove them: who is liable to penalties on non-compliance. 2. They are to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the parish, six days in every year, to labour in fetching materials, or repairing the highways: all persons keeping draughts (of three horses, &c.) or occupying lands, being obliged to send a team for every draught, and for every 50*l.* a year, which they keep or occupy; persons keeping less than a draught, or occupying less than 50*l.* a year, to contribute in a less proportion: and all other persons chargeable, between the ages of eighteen and sixty-five, to work or find a labourer. But they may compound with the surveyors, at certain easy rates established by the act. And every cartway leading to any market-town must be made twenty feet wide at the least, if the fences will permit; and may be increased by two justices, at the expense of the parish, to the breadth of thirty feet. 3. The surveyors may lay out their own money in purchasing materials for repairs, in erecting guide-posts, and making drains, and shall be reimbursed by a rate to be allowed at a special sessions. [359] 4. In case the personal labour of the parish be not sufficient, the surveyors, with the consent of the quarter sessions, may levy a rate on the parish, in aid of the personal duty, not exceeding, in any one year, together with the other highway rates, the sum of 9*d.* in the pound; for the due application of which they are to account upon oath. As for turnpikes, which are now pretty generally introduced in aid of such rates, and the law relating to them, these depend principally on the particular powers granted in the several road acts, and upon some general provisions, which are extended to all

Their office and duty.

(26) This statute was repealed by the General Highway Act (5 & 6 Wm. 4, c. 50); but under this act the surveyors of highways have nearly the same powers as in the text. Statute labour, however, has been abolished; and as to team-work, which may be performed by the rate-payers, keeping two or more beasts of draught, see sect. 35.

turnpike roads in the kingdom, by statute 13 Geo. III. c. 84, amended by many subsequent acts [k] [27].

VI. Overseers of the poor.

VI. I proceed therefore, lastly, to consider the overseers of the poor; their original, appointment, and duty.

Antiquity and origin of the office.

The poor of England, till the time of Henry VIII., subsisted entirely upon private benevolence, and the charity of well-disposed Christians. For though it appears by the mirrour[l], that by the common law the poor were to be "sustained by parsons, rectors of the church, and the parishioners, so that none of them die for default of sustenance;" and though by the statute 12 Ric. II. c. 7, and 19 Hen. VII. c. 12, the poor are directed to abide in the cities or towns wherein they were born, or such wherein they had dwelt for three years (which seems to be the first rudiments of parish settlements), yet till the statute 27 Hen. VIII. c. 25, I find no compulsory method chalked out for this purpose: but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were, in particular, their principal resource; and among other bad effects which attended the monastic institutions, it was not perhaps one of the least (though frequently esteemed quite otherwise) that they supported and fed a very numerous and very idle poor, whose

[k] Stat. 14 Geo. III. c. 14, 36, 57, 82; 16 Geo. III. c. 39; 18 Geo. III. c. 28.
[l] c. 1, § 3.

(27) The 13 Geo. 3, c. 84, and the various acts, which had been passed for its amendment, were consolidated by 3 Geo. 4, c. 126, the General Turnpike Act; which in its turn has been explained and amended by various statutes, as 4 Geo. 4, cc. 16, 35, & 95; 5 Geo. 4, c. 69; 7 Geo. 4, c. 64; 7 & 8 Geo. 4, cc. 24 & 30, and 9 Geo. 4, c. 77. Turnpike acts are generally only passed for a certain term of years, and a turnpike road will not become a public highway, so as to give the public a permanent right to it, unless there be an express provision for that purpose in the turnpike act. See 8 B. & C. 585; S. C. 3 Man. & Ry. 433.

An annual act is usually passed for the continuation of all local turnpike acts about to expire. The last of these acts is 6 & 7 Vict. c. 69.

Owing to the general introduction of railways, the tolls taken on turnpike roads have been so reduced in amount, that the Legislature has recently interfered in their favour; and by 2 & 3 Vict. c. 81; 3 & 4 Vict. c. 98; 4 & 5 Vict. c. 59, and 6 & 7 Vict. c. 59, the justices are now empowered at a special session, on proof of the deficiency of the funds of any turnpike trust, to order a portion of the highway-rate to be applied to the repair of the roads of such trust.

sustenance depended upon what was daily distributed in alms at the gates of the religious houses. But, upon the total dissolution of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom: and abundance of statutes were made in the reign of king Henry the Eighth and his children, for providing for the poor and impotent: which, the preambles to some of them recite, had of late years greatly increased. These poor were principally of two sorts; sick and impotent, and therefore unable to work; idle and sturdy, and therefore able but not willing, to exercise any honest employment. To provide in some measure for both of these, in and about the metropolis, Edward the Sixth founded three royal hospitals; Christ's and St. Thomas's, for the relief of the impotent through infancy or sickness; and Bridewell for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large: and therefore after many other fruitless experiments, by statute, 43 Eliz. c. 2, overseers of the poor were appointed in every parish. [360]

The mode of appointment.

By virtue of the statute last mentioned, these overseers are to be nominated yearly in Easter week, or within one month after (though a subsequent nomination will be valid[m]), by two justices dwelling near the parish. They must be substantial householders, and so expressed to be in the appointment of the justices[n].

Their office and duty.

Their office and duty, according to the same statute, are principally these: first, to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such other being poor, and not able to work: and secondly, to provide work for such as are able, and cannot otherwise get employment; but this latter part of their duty, which, according to the wise regulations of that salutary statute, should go hand in hand with the other, is now most shamefully neglected. However, for these joint purposes, they are empowered to make and levy rates upon the several inhabitants of the parish, by the same act of parliament; which has been farther explained and enforced by several subsequent statutes[28]. [361]

[m] Stra. 1123.

[n] 2 Lord Raym. 1394.

(28) By the "act for the amendment and better administration of the laws relating to the poor" (4 & 5 Wm. 4, c. 76), many and important changes

The two great objects of this statute seem to have been, 1. To relieve the impotent poor, and them only. 2. To find

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have been introduced into every branch of these laws.

By sects. 1—14, a board of three commissioners was established for a period of five years (but since continued by 3 & 4 Vict. c. 42; 5 Vict. c. 10, and 5 & 6 Vict. c. 57, to the 31st of July, 1847), with power to appoint assistant-commissioners, secretaries, clerks, and other officers. These commissioners are, by sect. 15, empowered to make and issue all such general rules, orders, and regulations, as they shall think proper, for the management of the poor, the government of workhouses, the maintenance, education, and apprenticing of the children of poor persons, and the guidance and control of all guardians, vestries, and parish officers, so far as relates to the management or relief of the poor; and also for the keeping, examining, auditing, and allowing of accounts, and the making and entering into contracts in all matters relating to such management or relief, or to any expenditure for the relief of the poor. These general rules must (sect. 16) be laid before the secretary of state, at least forty days before they come into operation, and, if disallowed by him, shall have no operation. They must also (sect. 17), be submitted to parliament within one week after the commencement of every session. By sect. 18, due notice and full publicity are required to be given to all such rules, orders, and regulations; which by sect. 19, are not to extend to oblige any inmate of a workhouse to attend any religious service contrary to his religious principles, or to educate any child in any religious creed opposed to the wish of the parents; licensed ministers of every religious persuasion being also allowed free access to all such inmates and children. By sect. 20, it is enacted, that no order or regulation of any assistant-commissioner shall have any force until approved of and sealed by the commissioners. Sects. 21—25, provide for the purchase of land for union workhouses, and their erection, enlargement, and alteration; as to which, see further 5 & 6 Wm. 4, c. 69; 6 & 7 Wm. 4, cc. 70, 107, and 7 Wm. 4, and 1 Vict. c. 50. Sects. 26, 28—37, empower the commissioners to unite several adjacent parishes into one union for the administration of the poor laws; and direct the due apportionment of the aggregate expenses of such union, by means of triennial averages to be taken as directed by the act. By sects. 38—41, the constitution and election of a board of guardians of the poor for every such union are defined; as to which, see further 5 & 6 Vict. c. 57. By sects. 42, 43, the commissioners are empowered to make rules, orders, and regulations to be observed in any then present or any future workhouse, and to prescribe in such rules, &c. the nature and amount of the relief to be given to, and the labour to be exacted from the persons relieved, and the preservation therein of good order; but if such rules, &c. affect more than one union, they are to be deemed general rules, and are liable to all the provisions of the act respecting general rules. By sect. 43, justices are empowered to see such bye-laws enforced and to visit workhouses pursuant to 30 Geo. 3, c. 49. By sect. 85, the commissioners are empowered to call for and publish accounts of charitable trusts; and by sect. 98, penalties are inflicted on all persons wilfully disobeying their rules, orders, and regulations.—By sect. 45, it is enacted, that no lunatic, insane person, or dangerous idiot, shall be detained in a workhouse longer than fourteen days; as to pauper lunatics, see 48 Geo. 3, c. 96; 51 Geo. 3, c. 79; 55 Geo. 3, c. 46; 56 Geo. 3, c. 117; 59 Geo. 3, c. 127, and 5 Geo. 4, c. 71.

employment for such as are able to work: and this principally by providing stocks of raw materials to be worked up at their separate homes, instead of accumulating all the poor in one common workhouse; a practice which puts the sober and diligent upon a level (in point of their earnings) with those who are dissolute and idle, depresses the laudable emulation of domestic industry and neatness, and destroys all endearing family connexions, the only felicity of the indigent. Whereas, if none were relieved but those who are incapable to get their livings, and that in proportion to their incapacity: if no chil-

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Sect. 46, provides for the appointment of paid officers for superintending or assisting in the administration of the relief and employment of the poor and of auditors of the accounts; and for their duties, mode of appointment, salaries, security, &c. By sect. 47, all overseers, treasurers, &c. are required to pass their accounts quarterly; as to which, see also 50 Geo. 3, c. 50. Sect. 48, enacts, that all masters of workhouses and other paid officers shall be removable by the commissioners. Sects. 49—51, relate to contracts for the supply of goods, materials, &c. for workhouses; see also sect. 77. Sect. 52, puts a stop to the very pernicious practice which prevailed, especially in rural districts, of giving out-door relief to persons who were wholly or partially employed, by enacting that the entire administration of out-door relief shall be subject to such rules, orders, and regulations, as the commissioners should fix; except under special circumstances and in cases of emergency, which must be forthwith reported to the commissioners. Any two justices, however, are empowered by a previous section (27), to order out-door relief to aged and infirm persons wholly unable to work. Sect. 53 repeals 36 Geo. 3, c. 23; 55 Geo. 3, c. 137, ss. 3 & 4, and 59 Geo. 3, c. 12, ss. 2 & 5. Sect. 54, deprives the overseers of their former power of giving relief or allowances to paupers, and places the ordering, giving, and directing of all relief of the poor under the board of guardians, subject always to the general rules, &c. issued by the commissioners, and with an exception in cases of urgent necessity, in which cases medical and other relief, but not in money, may be ordered by any justice of the peace. By sect. 55, masters of workhouses and other paid officers are required to keep registers of all persons in the receipt of parochial relief. Sects. 56 & 57, enact that relief to the wife shall be deemed relief to the husband, and relief to the child relief to the parent; which by sect. 58, may be considered as a loan. In order to recover the amount of such relief, justices are empowered by sect. 59, to attach the wages of such husband or father in the hands of masters or employers; and as to the recovery of relief given to poor persons under 43 Eliz. c. 2, s. 7, see sect. 78. Sect. 60, repeals so much of 43 Geo. 3, c. 45, as requires relief to be given to the wives and families of substitutes, hired men, or volunteers of militia. By sect. 61, justices are required to enforce compliance with the rules, &c. of the commissioners relating to the apprenticeship of poor children. Sect. 62, authorizes the raising of money by any parish for the purposes of emigration; which money, and also money raised for erecting or altering any workhouse, &c. may be advanced in exchequer bills, under 57 Geo. 3, c. 34; 1 & 2 Vict. c. 88, and the subsequent act.

dren were removed from their parents but such as are brought up in rags and idleness; and if every poor man and his family were regularly furnished with employment, and allowed the whole profits of their labour;—a spirit of busy cheerfulness would soon diffuse itself through every cottage; work would become easy and habitual, when absolutely necessary for daily subsistence; and the peasant would go through his task without a murmur, if assured that he and his children (when incapable of work through infancy, age, or infirmity), would then, and then only, be entitled to support from his opulent neighbours.

This appears to have been the plan of the statute of queen Elizabeth; in which the only defect was confining the management of the poor to small parochial districts, which are frequently incapable of furnishing proper work, or providing an able director. However, the laborious poor were then at liberty to seek employment wherever it was to be had: none being obliged to reside in the places of their settlement but such as were unable or unwilling to work, and those places of settlement being only such where they were *born*, or had made their *abode*, originally for three years[o], and afterwards (in the case of vagabonds) for one year only[p].

[362] After the Restoration a very different plan was adopted, which has rendered the employment of the poor more difficult, by authorizing the subdivision of parishes; has greatly increased their number, by confining them all to their respective districts; has given birth to the intricacy of our poor laws, by multiplying and rendering more easy the methods of gaining settlements; and, in consequence, has created an infinity of expensive law-suits between contending neighbourhoods, concerning those settlements and removals[29]. By the statute 13 & 14 Car. II. c. 12, a legal settlement was declared to be gained by *birth*; or by *inhabitancy*, *apprenticeship* or *service*,

[o] Stat. 19 Hen. VII. c. 12; 1 Edw. VI. c. 3; 3 Edw. VI. c. 16; 14 Eliz. c. 5.
[p] Stat. 39 Eliz. c. 4.

(29) Frivolous and vexatious appeals against orders of removal were in some measure checked by sect. 81 of the 4 & 5 Wm. 4, c. 76, which requires the parish appealing, at least fourteen days before the sessions at which such appeal is to be tried, to deliver to the overseers of the respondent parish a statement of the grounds of appeal; and by the provisions of sects. 82 & 83, the former of which empowers the court to award costs against the parish losing the appeal, and the latter against the parish serving a frivolous or vexatious ground of appeal whether successful or not.

for forty days: within which period all intruders were made removable from any parish by two justices of the peace, unless they settled in a tenement of the annual value of 10*l*. The frauds naturally consequent upon this provision, which gave a settlement by so short a residence, produced the statute 1 Jac. II. c. 17, which directed *notice* in writing to be delivered to the parish officers, before a settlement could be gained by such residence. Subsequent provisions allowed other circumstances of notoriety to be equivalent to such notice given; and those circumstances have from time to time been altered, enlarged, or restrained, whenever the experience of new inconveniences, arising daily from new regulations, suggested the necessity of a remedy. And the doctrine of *certificates* was invented, by way of counterpoise, to restrain a man and his family from acquiring a new settlement by any length of residence whatever, unless in two particular excepted cases; which makes parishes very cautious of giving such certificates, and of course confines the poor at home, where frequently no adequate employment can be had.

Law of settlements.

The law of settlements may be therefore now reduced to the following general heads; or, a settlement in a parish may be acquired, 1. By *birth;* for, wherever a child is first known to be, that is always *primâ facie* the place of settlement, until some other can be shewn [q]. This is also generally the place of settlement of a bastard child [r]; for a bastard, having in the eye of the law no father, cannot be referred to *his* [363] settlement, as other children may [s 30]. But in legitimate children, though the place of birth be *primâ facie* the settlement, yet it is not conclusively so; for there are, 2. Settlements by *parentage*, being the settlement of one's father or mother: all legitimate children being really settled in the parish where their parents are settled, until they get a new settlement for themselves [t]. A new settlement may be acquired several ways; as, 3. By *marriage*. For a woman,

[q] Carth. 433; Comb. 364; Salk. 485; 1 Lord Raym. 567.

[r] See p. 459.

[s] Salk. 427.

[t] Ibid. 528; 2 Lord Raym. 1473.

(30) By sect. 71 of 4 & 5 Wm. 4, c. 76, every child, born a bastard after the passing of that act, shall have and follow the settlement of the mother; until such child shall attain the age of sixteen, or shall acquire a settlement in its own right.

marrying a man that is settled in another parish, changes her own settlement: the law not permitting the separation of husband and wife [u]. But if the man has no settlement, her's is suspended during his life, if he remains in England, and is able to maintain her; but in his absence, or after his death or during (perhaps) his inability, she may be removed to her old settlement [v]. The other methods of acquiring settlements in any parish are all reducible to this one, of *forty days' residence* therein: but this forty days' residence (which is construed to be lodging or lying there) must not be by fraud, or stealth, or in any clandestine manner; but made notorious, by one or other of the following concomitant circumstances. The next method therefore of gaining a settlement, is, 4. By forty days' residence and *notice*. For if a stranger comes into a parish and delivers notice in writing of his place of abode, and number of his family, to one of the overseers (which must be read in the church and registered) and resides there unmolested for forty days after such notice, he is legally settled thereby [w]. For the law presumes that such a one at the time of notice is not likely to become chargeable, else he would not venture to give it; or that in such case the parish would take care to remove him [31]. But there are also other circumstances equivalent to such notice: therefore, 5. *Renting* for a year a tenement of the yearly value of ten pounds, and residing forty days in the parish, gains a settlement without notice [x], upon the principle of
[364] having substance enough to gain credit for such a house [32]. 6. Being charged to and paying the public *taxes* and levies of the parish (excepting those for scavengers, highways [y], and

[u] Stra. 544.
[v] Foley, 249, 251, 252; Burr. Sett. C. 370.
[w] Stat. 13 & 14 Car. II. c. 12; 1 Jac. II. c. 17; 3 & 4 Wm. & M. c. 11.
[x] Stat. 13 & 14 Car. II. c. 12.
[y] Stat. 9 Geo. I. c. 7, § 6.

(31) By 35 Geo. 3, c. 101, this mode of acquiring a settlement was abolished.

(32) By sect. 66 of 4 & 5 Wm. 4, c. 76, it was enacted, that after the passing of that act, no settlement shall be acquired or completed by occupying a tenement, unless the person occupying the same shall have been assessed to the poor-rate, and shall have paid the same, in respect of such tenement, for one year. This mode of acquiring a settlement had been previously much modified by 59 Geo. 3, c. 50; 6 Geo. 4, c. 57, and 1 Wm. 4, c. 18.

the duties on houses and windows;[z 33]) and, 7. Executing, when legally appointed, any public parochial *office*, for a whole year in the parish, as churchwarden, &c. are both of them equivalent to notice, and gain a settlement[a], if coupled with a residence of forty days[34]. 8. Being *hired* for a year, when unmarried and childless, and *serving* a year in the same service[35]; and, 9. Being bound an *apprentice*, give the servant and apprentice a settlement without notice[b], in that place wherein they serve the last forty days. This is meant to encourage application to trades, and going out to reputable services[36]. 10. Lastly, the having an *estate* of one's own, and residing thereon forty days, however small the value may be, in case it be acquired by act of law or of a third person, as by descent, gift, devise, &c. is a sufficient settlement[c]: but if a man acquire it by his own act, as by purchase (in its popular sense, in consideration of money paid), then unless the consideration advanced *bonâ fide* be 30*l.* it is no settlement for any longer time than the person shall inhabit thereon[d]. He is in no case removable from his own property; but he shall not, by any trifling or fraudulent purchase of his own, acquire a permanent and lasting settlement[37].

[z] Stat. 21 Geo. II. c. 10; 18 Geo. III. c. 26.

[a] Stat. 3 & 4 Wm. & M. c. 11.

[b] Stat. 3 & 4 Wm. & M. c. 11; 8 & 9 Wm. III. c. 10; 31 Geo. II. c. 11.

[c] Salk. 524.

[d] Stat. 9 Geo. I. c. 7.

(33) This mode of acquiring a settlement has been much entangled with that last mentioned, viz. by hiring or renting a tenement. The 33 Geo. 3, c. 101, in effect suspended it, but 59 Geo. 3, c. 50 (unintentionally it is said), brought it into operation again. Every settlement claimed in respect of payment of rates and levies under 3 Wm. & M. c. 11, s. 6, is subject to the restrictions imposed by 6 Geo. 4, c. 57.

(34) This mode of acquiring a settlement was abolished by sect. 64 of 4 & 5 Wm. 4, c. 76.

(35) This mode of acquiring a settlement was also abolished by sects. 64 & 65 of 4 & 5 Wm. 4, c. 76.

(36) By sect. 67 of 4 & 5 Wm. 4, c. 76, it was enacted, that after the passing of that act, no settlement should be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas, as a fisherman or otherwise, nor by any person then being such an apprentice in respect of such apprenticeship.

(37) By sect. 68 of 4 & 5 Wm. 4, c. 76, it was enacted, that no person should be deemed to retain any settlement, gained by virtue of any possession of any estate or interest in any parish, for any longer or further time than such person should inhabit within ten miles thereof; and in case such person should cease to inhabit within

All persons not so settled may be removed to their own parishes on complaint of the overseers by two justices of the peace, if they shall adjudge them likely to become chargeable [38] to the parish into which they have intruded: unless, they are in a way of getting a legal settlement, as by having a hired house of 10*l. per annum*, or living in an annual service [39]; for then they are not removable [e]. And in all other cases, if the parish to which they belong will grant them a certificate acknowledging them to be *their* parishioners, they cannot be removed merely because likely to
[365] become chargable, but only when they become *actually* chargeable [f]. But such certificated person can gain no settlement by any of the means above mentioned, unless by renting a tenement of 10*l. per annum*, or by serving an annual office in the parish, being legally placed therein: neither can an apprentice or servant to such certificated person gain a settlement by such their service [g 40].

These are the general heads of the laws relating to the poor, which, by the resolutions of the courts of justice thereon within a century past, are branched into a great variety. And yet, notwithstanding the pains that have been taken about them, they still remain very imperfect, and inadequate to the purposes they are designed for: a fate that has generally attended most of our statute laws, where they have not the foundation of the common law to build on. When the shires, the hundreds, and the tithings, were kept in the same admirable order in which they were disposed by

[e] Salk. 472. [f] Stat. 8 & 9 Wm. III. c. 30.
[g] Stat. 12 Ann. c. 18.

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such distance, and thereafter become chargeable, such person should be liable to be removed to the parish wherein previously to such inhabitancy he might have been legally settled, or in case he might have subsequently to such inhabitancy gained a legal settlement in some other parish, then to such other parish.

(38) Paupers are not removable until they become actually chargeable, see 35 Geo. 3, c. 101, amended by 49 Geo. 3, c. 129. As to the removal from England of poor persons born in Scotland or Ireland, see 3 & 4 Wm. 4, c. 40, which was confirmed and amended by 7 Wm. 4 and 1 Vict. c. 10, and 3 & 4 Vict. c. 27.

(39) But not until notice of such chargeability has been sent to the parish to which the justices' order of removal is directed, see 4 & 5 Wm. 4, c. 76, s. 79.

(40) Vide supra, p. 364, n. 32—36.

the great Alfred, there were no persons idle, consequently none but the impotent that needed relief: and the statute of 43 Eliz. seems entirely founded on the same principle. But when this excellent scheme was neglected and departed from, we cannot but observe with concern what miserable shifts and lame expedients have from time to time been adopted, in order to patch up the flaws occasioned by this neglect. There is not a more necessary or more certain maxim in the frame and constitution of society, than that every individual must contribute his share in order to the well-being of the community: and surely they must be very deficient in sound policy, who suffer one half of a parish to continue idle, dissolute, and unemployed; and at length are amazed to find, that the industry of the other half is not able to maintain the whole.

CHAPTER X.

OF THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.

HAVING in the eight preceding chapters, treated of persons as they stand in the public relations of *magistrates*, I now proceed to consider such persons as fall under the denomination of the *people*. And herein all the inferior and subordinate magistrates, treated of in the last chapter, are included.

Natural-born subjects.

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the king: and aliens, such as are born out of it.

Their allegiance.

Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feodal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the lord, and defend him against all his enemies. This obligation on the part of the vassal was called his *fidelitas* or fealty; and an oath of fealty was required, by the feodal law, to be taken by all tenants to their landlord, which is couched in almost the same

[367] terms as our ancient oath of allegiance[a]; except that in the

[a] 2 Feud. 5, 6, 7.

usual oath of fealty there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception; "*contra omnes homines fidelitatem fecit*[b]." Land held by this exalted species of fealty was called *feudum ligium*, a liege fee; the vassals *homines ligii*, or liege men; and the sovereign their *dominus ligius*, or liege lord. And when sovereign princes did homage to each other for lands held under their respective sovereignties, a distinction was always made between *simple* homage, which was only an acknowledgment of tenure[c]; and *liege* homage, which included the fealty before mentioned, and the services consequent upon it. Thus when our Edward III., in 1329, did homage to Philip VI. of France, for his ducal dominions on that continent, it was warmly disputed of what species the homage was to be, whether *liege* or *simple* homage[d]. But with us, in England, it becoming a settled principle of tenure, that *all* lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy the term of allegiance was soon brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for upwards of six hundred years[e], contained a promise "to be true and faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honour, and not to know or hear of any ill or damage intended him, without defending him therefrom." Upon which sir Matthew Hale[f] makes this remark; that it was short and plain, not entangled with long or intricate clauses or declarations, and yet is comprehensive of the whole duty from the

The oath of allegiance.

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[b] 2 Feud. 99.
[c] 7 Rep. Calvin's case, 7.
[d] 2 Cart. 401; Mod. Un. Hist. xxiii.
[e] Mirror, c. 3, § 35; Fleta, 3, 16; Britton, c. 29; 7 Rep. Calvin's case, 6.
[f] 1 Hal. P. C. 63.

subject to his sovereign. But, at the Revolution, the terms of this oath being thought perhaps to favour too much the notion of non-resistance, the present form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject only promising "that he will be faithful and bear *true* allegiance to the king," without mentioning "his heirs," or specifying in the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the pope's pretended authority: and the oath of abjuration, introduced in the reign of king William[g], very amply supplies the loose and general texture of the oath of allegiance; it recognizing the right of his majesty, derived under the act of settlement; engaging to support him to the utmost of the juror's power; promising to disclose all traitorous conspiracies against him; and expressly renouncing any claim of the descendants of the late pretender, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in any office, trust, or employment; and may be tendered by two justices of the peace to any person whom they shall suspect of disaffection[h]. And the oath of allegiance may be tendered[i] to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor, or in the sheriff's tourn, which is the court-leet of the county[i].

But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights, and bound to all the duties of sovereignty, before his coronation; so the
[369] subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage,

[g] Stat. 13 Wm. III. c. 6. [h] Stat. 1 Geo. I. c. 13; 6 Geo. III. c. 53.
[i] 2 Inst. 121; 1 Hal. P. C. 64.

(1) By sect. 10 of the Roman Catholic Emancipation Act (10 Geo. 4, c. 7), persons professing that religion were exempted from taking the oaths of allegiance, supremacy, and abjuration, but may be required to take the oath prescribed by the act in lieu thereof; see also 6 & 7 Vict. c. 28.

and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing its performance[k]. The formal profession, therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law. Which occasions sir Edward Coke very justly to observe[l], that "all subjects are equally bounden to their allegiance, as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same." The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion*.

Natural allegiance.

Allegiance, both expressed and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth[m]. For, immediately upon their birth, they are under the king's protection: at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature[n]. An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it is a principle of universal law[o], that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic and primitive, and antecedent to the other; and cannot be devested without the concurrent act of that prince [370] to whom it was first due[2]. Indeed the natural-born subject

[k] 1 Hal. P. C. 61.
[l] 2 Inst. 121.
[m] 7 Rep. 7.
[n] 2 P. Wms. 124.
[o] 1 Hal. P. C. 68.

(2) This principle, which our law writers have expressed by the maxim, "*nemo potest exuere patriam*," was strongly exemplified by the case of

of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another: but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince.

Local allegiance.

Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection[p]; and it ceases the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local temporary only: and that for this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a

[p] 7 Rep. 6.

Eneas McDonald, reported Fost. 184; in which case a native of Great Britain, who had received his education from his early infancy in France, and spent his riper years in a profitable employment in that kingdom, and had accepted a commission in the service of the French king; having, while acting under that commission, been taken in arms against the King of England, was indicted and convicted of high treason; though afterwards pardoned, on condition of his leaving the kingdom for ever. In 2 B. & C. 779, S. C. 4 D. & R. 394, it was held that upon the recognition of the independence of the United States of America in 1783, the natural-born subjects of the crown of England, adhering to the United States, became aliens to all intents and purposes. In 5 B. & C. 771, the converse was held, viz., that children, born in the United States after the recognition of American independence, of parents who had resided there before, but who were natural-born British subjects, and at the time of the separation of the two countries adhered to the British government, did not become aliens, but remained capable of inheriting lands in this country. Again, in 8 T. R. 31, and 1 B. & P. 430, a natural-born subject of this country, who had been admitted a citizen of the United States, either before or after the declaration of American independence, was held to be a subject of the United States, so as to be entitled to the benefit of all treaties of commerce between the two countries.

On the other hand, a British subject is entitled so far to throw off his country (*exuere patriam*) as to select a foreign domicil in complete derogation of his native domicil, and thus render his personal property in England distributable by succession or testament according to the foreign law; see Story's Conflict of Laws, c. xi. So also marriages and other contracts, entered into by British subjects while in a foreign country, are always governed by the *lex loci contractûs*; see Story's Conflict of Laws, cc. v. & viii.

constant tie to protect his natural-born subjects at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire. From which considerations sir Matthew Hale[q] deduces this consequence, that, though there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practice any thing against his crown and dignity: wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (unless in defence or aid of the rightful king) have been afterwards punished with death; because of the breach of that temporary allegiance which was due to him as king *de facto*. And upon this footing, after Edward IV. recovered the crown, which had been long detained from his [371] house by the line of Lancaster, treasons committed against Henry VI. were capitally punished; though Henry had been declared an usurper by parliament.

To whom allegiance is due.

This oath of allegiance, or rather the allegiance itself, is held to be applicable not only to the political capacity of the king, or regal office, but to his natural person and blood-royal: and for the misapplication of their allegiance, viz. to the regal capacity or crown, exclusive of the person of the king, were the Spensers banished in the reign of Edward II.[r] And from hence arose that principle of personal attachment and affectionate loyalty which induced our forefathers (and if occasion required, would doubtless induce their sons) to hazard all that was dear to them, life, fortune, and family, in defence and support of their liege lord and sovereign.

This allegiance then, both express and implied, is the duty of all the king's subjects, under the distinctions here laid down, of local and temporary, or universal and perpetual. Their rights are also distinguishable by the same criterions of time and locality; natural-born subjects having a great variety of rights, which they acquire by being born within the king's ligeance, and can never forfeit by any distance of place or

[q] 1 Hal. P. C. 60.

[r] 1 Hal. P. C. 67.

time, but only by their own misbehaviour: the explanation of which rights is the principal subject of the two first books of these Commentaries. The same is also in some degree the case of aliens; though their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove. I shall however here endeavour to chalk out some of the principal lines whereby they are distinguished from natives, descending to farther particulars when they come in course.

Disabilities and rights of aliens.

An alien born may purchase lands or other estates: but not for his own use: for the king is thereupon entitled to them [s]. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that which he owes to his own natural liege lord: besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences. Wherefore by the civil law such contracts were also made void [t]: but the prince had no such advantage of forfeiture thereby as with us in England. Among other reasons which might be given for our constitution, it seems to be intended by way of punishment for the alien's presumption, in attempting to acquire any landed property: for the vendor is not affected by it, he having resigned his right, and received an equivalent in exchange. Yet an alien may acquire a property in goods, money, and other personal estate [3], or may hire a house for his habitation [u]: for personal estate is of a transitory and moveable nature; and, besides, this indulgence to strangers is necessary for the advancement of trade. Aliens also may trade as freely as other people; only they are subject to certain

[372]

[s] Co. Litt. 2. [t] Cod. l. 11, tit. 55. [u] 7 Rep. 17.

(3) So it has been recently held, that under a devise of lands in trust to sell and invest the proceeds after payment of mortgages in the funds in trust for persons, some of whom were aliens, the crown was not entitled to the share of the aliens either in the land or the proceeds, but the same was to be applied for the benefit of the alien as directed by the testator. (1 Beav. 79; conf. 4 M. & C. 525). On the other hand, aliens, though resident in England and carrying on the business of merchants, are precluded by 3 & 4 Wm. 4, cc. 54, 55, from owning British registered shipping; and are therefore compelled to invest their capital in foreign built vessels.

higher duties at the custom-house [4]: and there are also some obsolete statutes of Henry VIII., prohibiting alien artificers to work for themselves in this kingdom: but it is generally held that they were virtually repealed by statute 5 Eliz. c. 7. Also an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate [w]; not as it is in France, where the king at the death of an alien is entitled to all he is worth, by the *droit d'aubaine* or *jus albinatus* [x], unless he has a peculiar exemption [5]. When I mention these rights of an alien, I must be understood of alien friends only, or such whose countries are in peace with our's; for alien enemies have no rights, no privileges, unless by the king's special favour during the time of war.

When I say that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law indeed stood absolutely so, with only a very few exceptions; so that a particular act of parliament became necessary after the Restoration [y], "for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles." And [373] this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's ambassadors born abroad were always held to be natural subjects [z]; for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England's allegiance, represented by his father, the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2, that all children born

[w] Lutw. 34.

[x] A word derived from *alibi natus*. Spelm. Gl. 24.

[y] Stat. 29 Car. II. c. 6.

[z] 7 Rep. 18.

(4) Aliens on their arrival in this country ought to be officially reported by the officers of customs; see 6 & 7 Wm. 4, c. 11, supra, p. 260, n. 18. And as to the duties on goods imported belonging to aliens, see supra, p. 317, n. 36.

(5) This right was abolished in 1791 by an act of the constituent assembly. But by the code civil (l. 1, tit. 1, s. 11), it was revived as against natives of those countries, whose laws subjected natives of France to a similar oppression.

abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England; and accordingly it hath been so adjudged in behalf of merchants [a]. But by several more modern statutes [b] these restrictions are still farther taken off; so that all children, born out of the king's ligeance, whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves, to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain [6]. Yet the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be protestants, and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such. In which the constitution of France differs from ours; for there, by their *jus albinatus*, if a child be born of foreign parents, it is an alien [c 7].

[a] Cro. Car. 601; Mar. 91; Jenk. Cent. 3.

[b] 7 Ann. c. 5; 4 Geo. II. c. 21, and 13 Geo. III. c. 21.

[c] Jenk. Cent. 3, cites *treasure francois*, 312.

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(6) Yet it was held by the judges in 1791 (4 T. R. 300), that by the act 4 Geo. 2, the heritable capacity is limited to the children of British fathers only. A child born abroad, therefore, of a British mother and foreign father, cannot succeed to the property of his mother, nor inherit the rights of a British subject. So much doubt, however, hangs over this subject, that a case arose a few years ago, in which a party, whose grandfather had been born out of the British dominions, wished to establish his rights as a British subject, and the opinions of the most eminent lawyers in the country were taken on the question, five of whom thought that he could inherit, and five that he could not. On the other hand, the Earl of Athlone, seventh in descent from Godart de Ginckell, created by King William, in March, 1691-2, Earl of Athlone, and who claimed to take his seat in the Irish house of peers in 1795, (more than a century after the family had left these kingdoms to reside in Holland), was admitted by that assembly to be a native-born subject of the British crown, and he took his inheritance within the ligeance of the king accordingly. (Vide Report on the Laws affecting Aliens, June, 1843).

(7) But by the Code Civil (l. 1, tit. 1, s. 9), such child may, within one year after attaining twenty-one years of age, elect France for his country.

Denizens.

A denizen is an alien born, but who has obtained *ex donatione legis* letters patent to make him an English subject: a high and incommunicable branch of the royal prerogative[d]. [374] A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance[e]: for his parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him; but his issue born *after* may[f]. A denizen is not excused[g] from paying the alien's duty, and some other mercantile burthens. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c., from the crown[h].

Naturalized persons.

Naturalization cannot be performed but by act of parliament: for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council or parliament, holding offices, grants, &c[i].

No bill for naturalization can be received in either house of parliament, without such disabling clause in it[j]: nor without a clause disabling the person from obtaining any immunity in trade thereby, in any foreign country; unless he shall have resided in Britain for seven years next after the commencement of the session in which he is naturalized[k]. Neither can any person be naturalized or restored in blood, unless he hath received the sacrament of the Lord's supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament[l]. But these provisions have been usually dispensed with by special acts of parliament, pre-

[d] 7 Rep. Calvin's case, 25.
[e] Co. Lit. 8 a.
[f] Co. Litt. 8; Vaugh. 285.
[g] Stat. 22 Hen. VIII. c. 8.
[h] Stat. 12 Wm. III. c. 2.
[i] Ibid.
[j] Stat. 1 Geo. I. st. 2, c. 4.
[k] Stat. 14 Geo. III. c. 84.
[l] Stat. 7 Jac. I. c. 2.

vious to bills of naturalization of any foreign princes or princesses [m] [8].

These are the principal distinctions between aliens, denizens, and natives: distinctions, which it hath been frequently endeavoured since the commencement of this century to lay
[375] almost totally aside, by one general naturalization act for all foreign protestants. An attempt which was once carried into execution by the statute 7 Ann. c. 5; but this, after three years' experience of it, was repealed by the statute 10 Ann. c. 5, except one clause, which was just now mentioned, for naturalizing the children of English parents born abroad. However, every foreign seaman, who in time of war serves two years on board an English ship by virtue of the king's proclamation, is *ipso facto* naturalized, under the like restrictions as in statute 12 Wm. III. c. 2. [n]; and all foreign protestants and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, and all foreign protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without afterwards absenting themselves from the king's dominions for more than one year, and none of them falling within the incapacities declared by statute 4 Geo. II. c. 21, shall be (upon taking the oaths of allegiance and abjuration, or, in some cases, an affirmation to the same effect) naturalized to all intents and purposes, as if they had been born in this kingdom; except as to sitting in parliament or in the privy council, and holding offices or grants of lands, &c., from the crown, within the kingdoms of Great Britain or Ireland [o]. They therefore, are admissible to all other privileges which protestants or Jews born in this kingdom are entitled to. What those privileges are, with respect to Jews [p] in particular, was the subject of very high debates about the time of the famous Jew-bill [q]; which enabled all Jews to

[m] Stat. 4 Ann. c. 1; 7 Geo. II. c. 3; 9 Geo. II. c. 24; 4 Geo. III. c. 4.

[n] Stat. 13 Geo. II. c. 3.

[o] Stat. 13 Geo. II. c. 7; 20 Geo. II. c. 44; 22 Geo. II. c. 45; 2 Geo. III. c. 25; 13 Geo. III. c. 25.

[p] A pretty accurate account of the Jews till their banishment in 8 Edw. I. may be found in Prynne's *demurrer*, and in Molloy *de jure maritimo*, b. 3, c. 6.

[q] Stat. 26 Geo. II. c. 26.

(8) For example, the act for the naturalization of His Royal Highness Prince Albert, which has been already mentioned, supra, p. 224, n. 5.

prefer bills of naturalization in parliament, without receiving the sacrament, as ordained by statute 7 Jac. I. It is not my intention to revive this controversy again; for the act lived only a few months, and was then repealed [r]: therefore peace be now to its *manes* [9].

[r] Stat. 27 Geo. II. c. 1.

(9) Jews are excluded from holding civil offices, not by any direct enactment or test, but solely the form of asseveration, appended to the abjuration oath and the declaration required by 9 Geo. 4, c. 17; which is couched in these terms: "upon the true faith of a Christian." In the year 1834, a bill was brought into parliament to remove the Jewish disabilities, and passed in the House of Commons by large majorities, but was thrown out in the Lords. It was brought forwards again in 1836, and again passed in the House of Commons, but was not introduced into the House of Lords, owing, it is said, to the late period of the session at which it had been introduced into the House of Commons. Lastly, in 1841, the attempt was renewed on a motion to bring in a bill to admit Jews into municipal corporations; which passed in the House of Commons by large majorities, but was again defeated in the upper house. The maxim constantly referred to on all trials for blasphemous libels, viz. "that Christianity is parcel of the law of England," forms the burthen of the speeches offered to the Legislature in opposition to this measure. See further Tucker's History of the Naturalization Bill; Blunt's Treatise on the Jews; and Goldsmith's Remarks on the Civil Disabilties of the British Jews; and for the law-learning relating to the Jews, see the cases cited by Mr. Swanston, in his report of the Bedford Charity Case, 2 Swanst. 470.

It may be observed, that by 5 & 6 Wm. 4, c. 28, the declaration, to be required under 9 Geo. 4, c. 17, of all persons filling corporate offices, is set aside; so far as regards sheriffs of cities and towns being counties of themselves. A Jew, therefore, may fill those offices. See *Rex* v. *Humphery*, 3 N. & P. 684.

CHAPTER XI.

OF THE CLERGY.

THE people, whether aliens, denizens, or natural-born subjects, are divisible into two kinds; the clergy and the laity: the clergy comprehending all persons in holy orders, and in ecclesiastical offices, will be the subject of the following chapter.

This venerable body of men, being separate and set apart from the rest of the people, in order to attend the more closely to the services of Almighty God, have thereupon large privileges allowed them by our municipal laws: and had formerly much greater, which were abridged at the time of the Reformation on account of the ill use which the popish clergy had endeavoured to make of them. For, the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. But it is observed by sir Edward Coke [a], that, as the overflowing of waters doth many times make the river to lose its proper channel, so in times past ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not those which of right belonged to them. The personal exemptions do indeed for the most part continue. A clergyman cannot be compelled to serve on a jury [1], nor to appear at a court-leet or view of frank-pledge; which almost every other person is obliged to do; [b] but if a layman is summoned on a jury, and before the trial takes orders, he shall
[377] notwithstanding appear and be sworn [c 2]. Neither can he be

[a] 2 Inst. 4. [b] F. N. B. 160; 2 Inst. 4. [c] 4 Leon. 190.

(1) Vide 6 Geo. 4, c. 50, s. 2.

(2) So by 52 Hen. 3, c. 10, it was provided, that neither archbishops nor bishops, nor any religious men nor women, should be compelled to attend the sheriff's tourn, except for some special cause. See also 9 Edw. 3, c. 3.

chosen to any temporal office; as bailiff, reeve, constable, or the like, in regard of his own continual attendance on the sacred function [d]. During his attendance on divine service he is privileged from arrests in civil suits. [e 3]. In cases also of felony, a clerk in orders shall have the benefit of his clergy, without being branded in the hand; and may likewise have it more than once: in both of which particulars he is distinguished from a layman [f 4]. But as they have their privileges, so also they have their disabilities, on account of their spiritual avocations. Clergymen, we have seen [g], are incapable of sitting in the house of commons; and by statute 21 Hen. VIII. c. 13, are not (in general) allowed to take any lands or tenements to farm, upon pain of 10*l. per* month, and total avoidance of the lease; nor upon like pain to keep any tanhouse or brewhouse; nor shall engage in any manner of trade, nor sell any merchandise, under forfeiture of the treble value [5]. Which prohibition is consonant to the canon law.

[d] Finch. L. 88.

[e] Stat. 50 Edw. III. c. 5; 1 Ric. II. c. 15.

[f] 2 Inst. 637; stat. 4 Hen. VII. c. 13, and 1 Edw. VI. c. 12.

[g] Page 175.

(3) By this privilege a clergyman is protected from arrest on civil process *eundo morando et redeundo;* but from arrest on criminal process only during the actual continuance of divine service. See Cro. Jac. 321, and 29 Car. 2, c. 7, s. 6. But he loses the protection, if he stay in the church with a fraudulent design merely to elude process. By 9 Geo. 4, c. 31, s. 23, it was made a misdemeanor in any person to arrest a clergyman in violation of his privilege. For a minute enumeration of clerical privileges, see Godolph. Abr. 193; Degge, 123.

(4) Benefit of clergy was abolished by 6 Geo. 4, c. 25, s. 3, and 7 & 8 Geo. 4, c. 28, ss. 6 & 7.

(5) The 21 Hen. 8, c. 13, was repealed by 57 Geo. 3, c. 99, but the law on this subject has been recently consolidated and amended by 1 & 2 Vict. c. 106; 2 & 3 Vict. c. 49, and 3 & 4 Vict. c. 86. By sect. 28, of the first mentioned of these acts, spiritual persons are forbidden to take to farm for occupation more than eighty acres, except with the consent of the bishop, (and then not for more than seven years), under a penalty of 40*s.* per annum for each acre above eighty. By sect. 29, spiritual persons, beneficed or performing ecclesiastical duty, are also forbidden to engage in trade or buy to sell again for profit or gain; on which section, see *Hule* v. *Hale*, 4 Beav. 369. But by sect. 30, this prohibition does not extend to spiritual persons engaged in keeping schools, or as tutors, &c. in respect of any thing done or any buying or selling in such employment, or to selling anything *bonâ fide* bought for the use of the family, or to being a manager, &c. in any benefit or life or fire assurance society; on which, see *Hall* v. *Franklin*, 3 M. & W. 253, and 1 & 2 Vict. c. 10; or to buying and selling cattle, &c. (but not in person), where incidental to the occupation of glebe or other land, which such spiritual person may lawfully hold.

In the frame and constitution of ecclesiastical polity there are divers ranks and degrees; which I shall consider in their respective order, merely as they are taken notice of by the secular laws of England; without intermeddling with the canons and constitutions by which the clergy have bound themselves. And under each division I shall consider, 1. The method of their appointment; 2. Their rights and duties; and, 3. The manner wherein their character or office may cease.

Archbishops and bishops.

I. An archbishop or bishop[6] is elected by the chapter of

(6) In 1835, commissioners were appointed to consider the state of the established church in England and Wales, with reference to ecclesiastical duties and revenues; the crown, the two archbishops, several of the bishops, and many other patrons consenting not to nominate to any vacant prebend, canonry, or benefice, without cure of souls, which might be in their patronage respectively, until the circumstances connected with such prebend, &c. should have undergone the consideration of the commissioners. For the purpose of protecting the revenues of such vacant benefices and of others then already vacant, and of appropriating them to the purposes of the established church, 5 & 6 Wm. 4, c. 30 was passed, which directs such revenues to be paid to the treasurer of queen Anne's bounty, during the existence of the ecclesiastical commission. In the following session, 6 & 7 Wm. 4, c. 67, called the Ecclesiastical Suspension Act, was passed, for the purpose of suspending the appointment to certain cathedral dignities, offices, and sinecure rectories, which the commissioners had in their report recommended should be either entirely abolished or placed upon a different footing; which act has been continued and amended by 7 Wm. 4 and 1 Vict. c. 71; 1 & 2 Vict. c. 108; 2 & 3 Vict. cc. 9, 14 & 55. In the same session was also passed the 6 & 7 Wm. 4, c. 77, (amended by 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39; 5 & 6 Vict. c. 58, and 6 & 7 Vict. c. 60), in the preamble of which are enumerated several very extensive alterations in dioceses, revenues, and patronage, which had been recommended by the commissioners in their third report; and after having incorporated the commissioners and given them extensive powers of inquiry, enabled them from time to time to lay before the king in council such schemes as appeared to them best suited to carry into effect their various recommendations, and enacted, that such schemes, when approved by the council, should have the effect of a law, from the time of their being gazetted. The chief of these recommendations, which have been already carried into execution, are the equalization of the territories and duties of the bishops; the creation of the new see of Ripon out of the sees of York and Chester; the union of the sees of Bangor and St. Asaph (on which, however, see 4 & 5 Vict. c. 39, s. 28; 5 & 6 Vict. c. 58, and 6 & 7 Vict. c. 60); and those of Gloucester and Bristol; the augmentation of the incomes of the smaller out of the revenues of the larger bishopricks, so as to give the following average annual incomes to the various archbishops and bishops, viz. Canterbury, 15,000*l.*; York, 10,000*l.*; London, 10,000*l.*; Durham, 8000*l.*; Winchester, 7000*l.*; Ely, 5500*l.*; St. Asaph

his cathedral church, by virtue of a license from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all Christendom; and this was promiscuously performed by the laity as well as the clergy [h]: till at length it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture, the elected bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the emperor Charlemagne, *A. D.* 773, by pope Hadrian I., and the council of Lateran [l], and universally exercised by other christian princes: but the policy of the court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishopricks is said to have been in the crown of England [k] (as well as other kingdoms in Europe), even in the Saxon times: because the rights of confirmation and investiture were in effect (though not in form), a right of complete donation [l]. But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*, by the prince's delivering

Their appointment.

[378]

[h] *Per clerum et populum.* Palm. 25; 2 Roll. Rep. 102; Mat. Paris, A.D. 1095.

[l] Decret. 1, dist. 63, c. 22.

[k] Palm. 28.

[l] "*Nulla electio prælatorum (sunt verba Ingulphi) erat mere libera et canonica; sed omnes dignitates, tam episcoporum quam abbatum, per annulum et baculum regis curia pro sua complacentia conferebat.*" *Penes clericos et monachos fuit electio, sed electum a rege postulabant.* Selden. Jan. Ang. l. 1, § 39.

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and Bangor, 5200*l.*, and to the other bishops, not less than 4000*l.*, nor more than 5000*l.* each; and lastly, the regulation of the cathedral and collegiate churches, and their deans and chapters, archdeaconries, rural deaneries, prebends, canonries, sinecure rectories, &c., on which, see 3 & 4 Vict. c. 113.

to the prelate a ring, and pastoral staff or crosier: pretending that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction: and pope Gregory VII., towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them [m]. This was a bold step
[379] towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority: and long and eager were the contests occasioned by this papal claim. But at length, when the emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum* and not *per annulum et baculum;* and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for a while its other pretensions [n].

This concession was obtained from king Henry the First in England, by means of that obstinate and arrogant prelate, archbishop Anselm [o]; but king John (about a century afterwards), in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops: reserving only to the crown the custody of the temporalities during the vacancy; the form of granting a licence to elect (which is the original of our *conge d'eslire*), on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause [p]. This grant was expressly recognized and confirmed in king John's *magna charta* [q], and was again established by statute 25 Edw. III. st. 6, s. 3.

But by statute 25 Hen. VIII. c. 20 [7]. the ancient right of

[m] Decret. 2, caus. 16, qu. 7, c. 12, 13.
[n] Mod. Un. Hist. xxv. 363, xxix. 115.
[o] M. Paris, A.D. 1107.
[p] M. Paris, A.D. 1214; 1 Rym. Fœd. 198.
[q] Cap. 1, edit. Oxon. 1759.

(7) This statute was repealed by 1 Edw. 6, c. 2, but revived by 1 & 2 P. & M. c. 8, and 1 Eliz. c. 1; see 12 Rep. 7, and Harg. Co. Lit. 134 a. n. 5. The

nomination was, in effect, restored to the crown: it being enacted that, at every future avoidance of a bishoprick, the king may send the dean and chapter his usual licence to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect: and, if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may by letters [380] patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the king's letters patent to the archbishop of the province: if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected: which they are bound to perform immediately, without any application to the see of Rome. After which the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire*.

Powers and duties of archbishops.

An archbishop is the chief of the clergy in a whole province; and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause [r]. The archbishop has also his own diocese, wherein he exercises episcopal jurisdiction; as in his province he exercises archiepiscopal. As archbishop he, upon receipt of the king's writ, calls the bishops and clergy of his province to meet in convocation; but without the king's writ he cannot assemble them [s]. To him all appeals are made from inferior jurisdictions within his province; and as an appeal lies from the bishops in person to him in person, so it also

[r] Lord Raym. 541.

[s] 4 Inst. 322, 323.

five bishopricks, Gloucester, Bristol, Peterborough, Oxford, and Chester, founded by Hen. 8, out of the ruins of the dissolved monasteries, were always donative in form as well as substance; see Harg. Co. Lit. 134 a. n. 3, 4, 5; 344 a. As also are all the Irish bishopricks, see 2 Eliz. c. 4, (Irish Statutes) and the bishopricks founded upon the recommendation of the ecclesiastical commissioners, under 6 & 7 Wm. 4, c. 77.

lies from the consistory courts of each diocese to his archiepiscopal court. During the vacancy of any see in his province, he is guardian of the spiritualities thereof, as the king is of the temporalities; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of prior of Canterbury was abolished at the Reformation [t]. The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose; which is therefore called his *option* [u]: which options are only binding on the bishop himself who grants them, and not on his successors. The prerogative itself seems to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury [w]. And we may add, that the papal claim itself (like most others of that encroaching see) was probably set up in imitation of the imperial prerogative called *primæ* or *primariæ preces*; whereby the emperor exercises, and hath immemorially exercised [x], a right of naming to the first prebend that becomes vacant after his accession in every church of the empire [y]. A right that was also exercised by the crown of England in the reign of Edward I. [z]; and which probably gave rise to the royal corodies which were mentioned in a former chapter [a]. It is likewise the privilege, by custom, of the archbishop of Canterbury, to crown the kings and queens of this kingdom. And he hath also by the statute 25 Hen. VIII. c. 21, the power of granting dispensations in any case, not contrary to

[381]

[t] 2 Roll. Abr. 223.

[u] Cowel's interpr. tit. *option*.

[w] Sherlock of options, 1.

[x] Goldast. const. Imper. tom. 3, page 406.

[y] Dufresne, V. 806; Mod. Univ. Hist. xxix. 5.

[z] *Rex, &c. salutem, Scribatis episcopo Karl. quod—Roberto de Icard pensionem suam, quam ad preces regis prædicto Roberto concessit, de cætero solvat; et de proxima ecclesia vacatura de collatione prædicti episcopi, quam ipse Robertus acceptaverit, respiciat.* Brev. 11 Edw. I. 3 Pryn. 1264.

[a] Ch. 8, p. 284.

the holy scriptures and the law of God, where the pope used formerly to grant them; which is the foundation of his granting special licences to marry at any place or time, to hold two livings, and the like: and on this also is founded the right he exercises of conferring degrees, in prejudice of the two universities[b].

The power and authority of a bishop, besides the administration of certain holy ordinances peculiar to that sacred order, consist principally in inspecting the manners of the people and clergy, and punishing them in order to reformation, by ecclesiastical censures[8]. To this purpose he has several courts under him, and may visit at pleasure every part of his diocese. His chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some university[c]. It is also the business of a bishop to institute, and to direct induction to all ecclesiastical livings in his diocese.

Powers and duties of bishops.

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Archbishopricks and bishopricks may become void by death, deprivation for any very gross and notorious crime, and also by resignation[9]. All resignations must be made to some superior[d]. Therefore a bishop must resign to his metropolitan; but the archbishop can resign to none but the king himself.

How archbishopricks and bishopricks become void.

[b] See the bishop of Chester's case. Oxon.

[c] Stat. 37 Hen. VIII. c. 17.

[d] Gibs. cod. 822.

(8) By 3 & 4 Vict. c. 86, bishops are empowered to issue commissions of inquiry against, and to pronounce ecclesiastical sentence upon, clergymen charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against those laws: and in the mean time such clergyman may be inhibited by the bishop from performing services in the church. Proceedings under this act, however, must be commenced within two years after the commission of the offence.

(9) It was an ancient custom that, when a bishop was absent from his diocese on an embassy, or by age or other infirmity became unable to fulfil his episcopal office, his spiritual duties of ordaining, &c. were committed to a "suffragan bishop," who was also called a "chorepiscopus," while his jurisdiction in collating, instituting, &c. was entrusted to a "coadjutor." (1 Burn. E. L. 246, 249). But now by 6 & 7 Vict. c. 62, it is provided, that when any archbishop or bishop shall have been reported by commissioners appointed under the act, to be incapable by reason of mental infirmity (sect. 11), or shall have been found lunatic under a commission *de lunatico inquirendo* (sect. 14), and therefore incapable of duly performing his archiepiscopal or episcopal functions, one of the other bishops shall be appointed to perform such functions, and another spiritual person to assist in the administration of the temporalities of the see, until the death or recovery of such archbishop or bishop.

II. Dean and chapter.

II. A dean and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see[e]. When the rest of the clergy were settled in the several parishes of each diocese (as hath formerly[f] been mentioned), these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean, being probably at first appointed to superintend *ten* canons or prebendaries.

Their appointment.

All ancient deans are elected by the chapter, by *conge d'eslire* from the king, and letters missive of recommendation; in the same manner as bishops[10]; but in those chapters that were founded by Henry VIII. out of the spoils of the dissolved monasteries, the deanery is donative, and the installation merely by the king's letter patent[g]. The chapter, consisting of canons or prebendaries, are sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other.

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The dean and chapter are, as was before observed, the nominal electors of a bishop. The bishop is their ordinary and immediate superior; and has, generally speaking, the power of visiting them, and correcting their excesses and enormities. They had also a check on the bishop at common law: for till the statute 32 Hen. VIII. c. 28, his grant or lease would not have bound his successors unless confirmed by the dean and chapter[h].

How deaneries and prebends become void.

Deaneries and prebends may become void, like a bishoprick, by death, by deprivation, or by resignation to either the king or the bishop[i]. Also I may here mention once for all, that if a dean, prebendary, or other spiritual person, be made a bishop, all the preferments of which he was before possessed are void; and the king may present to them in right of his prerogative royal. But they are not void by the election, but only by the consecration[j].

[e] 3 Rep. 75; Co. Litt. 103, 300.
[f] Page 113, 114.
[g] Gibs. cod. 173.
[h] Co. Lit. 103.
[i] Plowd. 498.
[j] Bro. Abr. tit. *presentation*, 3, 61; Cro. Eliz. 542, 790; 2 Roll. Abr. 352; 4 Mod. 200; Salk. 137.

(10) For a full account of the mode of election, presentation, or donation to deaneries, see Harg. Co. Lit. 95, n. 1—5. The ecclesiastical commissioners having recommended that several new archdeaconries should be created and that districts should be assigned to them, and that the limits of existing deaneries and archdeaconries should be newly arranged, orders in council for that purpose have been issued under 6 & 7 Wm. 4, c. 77; see also 3 & 4 Vict. c. 113.

III. An archdeacon hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of his diocese, or in some particular part of it. He is usually appointed by the bishop himself; and hath a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his[k]. He therefore visits the clergy; and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance. III. Archdeacons.

IV. The rural deans are very ancient officers of the church[l], but almost grown out of use; though their deaneries still subsist as an ecclesiastical division of the diocese, or archdeaconry. They seem to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidates for confirmation, and armed, in minuter matters, with an inferior degree of judicial and coercive authority[m]. IV. Rural deans.

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V. The next, and indeed the most numerous, order of men, in the system of ecclesiastical polity, are the parsons and vicars of churches: in treating of whom I shall first mark out the distinction between them; shall next observe the method by which one may become a parson or vicar; shall then briefly touch upon their rights and duties; and shall, lastly, shew how one may cease to be either. V. Parsons and vicars.

A parson, *persona ecclesiæ*, is one that hath full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church, which is an invisible body, is represented: and he is in himself a body corporate, in order to protect and defend the rights of the church (which he personates) by a perpetual succession[n]. He is sometimes called the rector or governor of the church: but the appellation of *parson* (however it may be depreciated by familiar, clownish, and indiscriminate use), is the most legal, most beneficial, and most honourable title that a parish priest can enjoy; because such a one (sir Edward Coke observes), and he only, is said *vicem seu personam ecclesiæ gerere*. A Distinction between them.

[k] 1 Burn. eccl. law, 68, 69.
[l] Kennett. par. antiq. 633.
[m] Gibs. cod. 972, 1550.
[n] Co. Litt. 300.

parson has, during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes *appropriated;* that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private clergyman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtile inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a fourfold division; one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incum-
[385] bent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities (the endowment of which was construed to be a work of the most exalted piety), subject to the burthen of repairing the church, and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's licence, and consent of the bishop, must first be obtained: because both the king and the bishop may some time or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies: and also because the law reposes a confidence in them, that they will not consent to anything that shall be to the prejudice of the church. The consent of the patron also is necessarily implied: because (as was before observed) the appropriation can be originally made to none, but to such spiritual corporation, as is also the patron of the church; the whole being indeed nothing else, but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the

service of the church[o]. When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church; and must sue and be sued, in all matters concerning the rights of the church, by the name of parsons[p].

This appropriation may be severed, and the church become disappropriate, two ways: as first, if the patron or appropriator presents a clerk, who is instituted and inducted to the parsonage: for the incumbent so instituted and inducted is to all intents and purposes complete parson: and the appropriation, being once severed, can never be reunited again, unless by a [386] repetition of the same solemnities[q]. And, when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a *sinecure*; because he hath no cure of souls, having a vicar under him to whom that cure is committed[r]. Also, if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriate at common law; because the perpetuity of person is gone, which is necessary to support the appropriation.

In this manner, and subject to these conditions, may appropriations be made at this day: and thus were most, if not all, of the appropriations at present existing originally made: being annexed to bishopricks, prebends, religious houses, nay, even to nunneries and certain military orders, all of which were spiritual corporations. At the dissolution of monasteries by statutes 27 Hen. VIII. c. 28, and 31 Hen. VIII. c. 13, the appropriations of the several parsonages, which belonged to those respective religious houses (amounting to more than one third of all the parishes in England[s]), would have been by the rules of the common law disappropriated, had not a clause in those statutes intervened, to give them to the king in as ample a manner as the abbots, &c., formerly held the same, at the time of their dissolution. This, though perhaps scarcely defensible, was not without example; for the same was done in former reigns, when the alien priories (that is, such as were filled by foreigners only) were dissolved and given to the crown[t]. And from these two roots have sprung

[o] Plowd. 496—500.
[p] Hob. 307.
[q] Co. Litt. 46.
[r] Sinecures might also be created by other means. 2 Burn. eccl. law, 347.
[s] Seld. review of tith. c. 9; Spelm. Apology, 35.
[t] 2 Inst. 584.

all the lay appropriations or secular parsonages which we now see in the kingdom; they having been afterwards granted out from time to time by the crown[u].

These appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments, in those parishes of which
[387] the society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius* or *vicar*. His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere*[w]. But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose: and accordingly it is enacted by statute 15 Ric. II. c. 6, that in all appropriations of churches, the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be *sufficiently* endowed. It seems the parishes were frequently sufferers, not only by the want of divine service, but also by withholding those alms for which, among other purposes, the payment of tithes was originally imposed: and therefore in this act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend: and therefore by statute 4 Hen. IV. c. 12, it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes, to do divine service, to inform the people, and to keep hospitality. The endowments in consequence of these statutes have usually been by a portion of the glebe or land belonging to the parsonage, and a particular share of the tithes which the

[u] Sir H. Spelman (of tithes, c. 29), says, these are now called impropriations, as being *improperly* in the hands of laymen. [*Duke of Portland* v. *Bingham*, 1 Hagg. 162].

[w] Seld. tith. c. 11, 1.

appropriators found it most troublesome to collect, and which are therefore generally called privy or small tithes; the greater, or predial, tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed: and hence, the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes.

The distinction therefore of a parson and vicar is this: the [388] parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of his profits, to whom he is in effect perpetual curate, with a standing salary. Though in some places the vicarage has been considerably augmented by a large share of the great tithes; which augmentations were greatly assisted by the statute 29 Car. II. c. 8, enacted in favour of poor vicars and curates, which rendered such temporary augmentations (when made by the appropriators) perpetual.

Appointment of parson or vicar.

The method of becoming a parson or vicar is much the same. To both there are four requisites necessary: holy orders; presentation; institution; and induction. The method of conferring the holy orders of deacon and priest, according to the liturgy and canons[x], is foreign to the purpose of these Commentaries; any farther than as they are necessary requisites to make a complete parson or vicar. By common law, a deacon, of any age, might be instituted and inducted to a parsonage or vicarage: but it was ordained by statute 13 Eliz. c. 12, that no person under twenty-three years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained priest within one year after his induction, he should be *ipso facto* deprived: and now, by statute 13 & 14 Car. II. c. 4, no person is capable to be admitted to any benefice, unless he hath been first ordained a priest; and then he is, in the language of the law, a clerk in orders[11]. But if he obtains orders, or a

[x] See 2 Burn. eccl. law, 103.

(11) By canon 34 of 1603, no bishop shall admit any person into sacred orders, except he, desiring to be a deacon, is three-and-twenty years old; and, to be a priest, four-and-twenty years complete; and so it is in the

license to preach, by money or corrupt practices (which seems to be the true, though not the common, notion of simony), the person giving such orders forfeits[y] 40*l.* and the person receiving 10*l.*, and is incapable of any ecclesiastical preferment for seven years afterwards.

Any clerk may be presented[z] to a parsonage or vicarage; that is, the patron, to whom the advowson of the church
[389] belongs, may offer his clerk to the bishop of the diocese to be instituted. Of advowsons, or the right of presentation, being a species of private property, we shall find a more convenient place to treat in the second part of these Commentaries. But when a clerk is presented, the bishop may refuse him upon many accounts. As, 1. If the patron is excommunicated, and remains in contempt forty days[a]. Or, 2. If the clerk be unfit[b]: which unfitness is of several kinds. First, with regard to his person; as, if he be a bastard, an outlaw, an excommunicate, an alien, under age, or the like[c]. Next, with regard to his faith or morals; as for

[y] Stat. 31 Eliz. c. 6.

[z] A layman may also be presented; but he must take priest's orders before his admission. 1 Burn. 103.

[a] 2 Roll. Abr. 355.

[b] Glan. l. 13, c. 20.

[c] 2 Roll. Abr. 356; 2 Inst. 632; Stat. 3 Ric. II. c. 3; 7 Ric. II. c. 12.

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preface to the form of ordination, unless he have a faculty or dispensation from the archbishop of Canterbury, which is granted sometimes to persons of extraordinary abilities, to be admitted to deacon's orders sooner; an example of which occurred in the case of George Whitfield, one of the founders of the methodist connexion, who was ordained deacon in the twenty-second year of his age. The right of granting these faculties is, by 44 Geo. 3, c. 43, limited to the archbishops of Canterbury and Armagh. For priest's orders there can be no dispensation, (Gibs. 146); for by the stat. 13 Eliz. c. 12, it is enacted, that "none shall be admitted minister, being under the age of four-and-twenty years;" and minister here means one capable of all ministration, which is a priest only. (Rog. Ec. Law, Ordination). Finally, by 44 Geo. 3, c. 43, s. 1, it is enacted, that the admission of persons to be priests or deacons within the above ages respectively, "shall be void in law, as if such admission had not been made, and the person so admitted shall be wholly incapable of having, holding, or enjoying, or being admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever, in virtue of such his admission as deacon or priest respectively, or of any qualification derived or supposed to be derived therefrom. Provided always, that no title to confer or present by lapse shall accrue by any avoidance or deprivation *ipso facto*, by virtue of this statute, but after six months' notice of such avoidance or deprivation given by the ordinary to the patron."

any particular heresy, or vice that is *malum in se:* but if the bishop alleges only in generals, as that he is *schismaticus inveteratus*, or objects a fault that is *malum prohibitum* merely, as haunting taverns, playing at unlawful games, or the like; it is not good cause of refusal[d]. Or, lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of which cases the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, there the bishop must give notice to the patron of such his cause of refusal, who, being usually a layman, is not supposed to have knowledge of it; else he cannot present by lapse: but if the cause be temporal, there he is not bound to give notice[e].

If an action at law be brought by the patron against the bishop for refusing his clerk, the bishop must assign the cause. If the cause be of a temporal nature, and the fact admitted (as, for instance, outlawry), the judges of the king's courts must determine its validity, or whether it be sufficient cause of refusal: but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature (as heresy particularly alleged), the fact, if denied, shall also be determined by a jury; and if the fact be admitted or found, the court upon consultation and advice of learned divines shall decide its sufficiency[f]. If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but only allege that he is deficient[g]: for the [390] statute 9 Edw. II. st. 1. c. 13, is express, that the examination of the fitness of a person presented to a benefice belongs to the ecclesiastical judge. But because it would be nugatory in this case to demand the reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore if the bishop returns the clerk to be *minus sufficiens in literatura*, the court shall write to the metropolitan to re-examine him, and certify his qualifications; which certificate of the archbishop is final[h].

If the bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be instituted by

[d] 5 Rep. 58.
[e] 2 Inst. 632.
[f] 2 Inst. 632.
[g] 5 Rep. 58; 3 Lev. 313.
[h] 2 Inst. 632.

him; which is a kind of investiture of the spiritual part of the benefice: for by institution the care of the souls of the parish is committed to the charge of the clerk. When a vicar is instituted, he (besides the usual forms) takes, if required by the bishop, an oath of perpetual residence[12]; for the maxim of law is, *vicarius non habet vicarium:* and, as the non-residence of the appropriators was the cause of the perpetual establishment of vicarages, the law judges it very improper for them to defeat the end of their constitution, and by absence to create the very mischief which they were appointed to remedy: especially as, if any profits are to arise from putting in a curate, and living at a distance from the parish, the appropriator, who is the real parson, has undoubtedly the elder title to them. When the ordinary is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a collation to a benefice. By institution or collation the church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron: but the church is not full against the king till induction: nay, even if a clerk is instituted upon the king's presentation, the crown may revoke it before induction, and present another clerk[1]. Upon institution also the clerk may enter on the parsonage-house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

[391] Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like: and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This therefore is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full

[1] Co. Litt. 344.

(12) By 1 & 2 Vict. c. 106, s. 61, it was enacted, that no oath should be required of or taken by any vicar in relation to residence on his vicarage; any law, custom, constitution, or usage to the contrary notwithstanding.

and complete possession, and is called in law *persona impersonata*, or parson imparsonee [k].

Rights and duties of parson and vicar.

The rights of a parson or vicar, in his tithes and ecclesiastical dues, fall more properly under the second book of these Commentaries: and as to his duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with a tolerable conciseness or accuracy. Some of them we may remark as they arise in the progress of our inquiries, but for the rest I must refer myself to such authors as have compiled treatises expressly upon this subject [l]. I shall only just mention the article of residence, upon the supposition of which the law doth style every parochial minister an incumbent. By statute 21 Henry VIII. c. 13 [13], persons wilfully absenting themselves from their benefices for one month together, or two months in the year, incur a penalty of 5*l.* to the king, and 5*l.* to any person that will sue for the same: except chaplains to the king or others therein mentioned [m], during their attendance in the household of such as retain them: and also except [n] all heads of houses, magistrates, and professors in the universities, and all students under forty years of age residing there *bonâ fide* for study. Legal residence is [392] not only in the parish, but also in the parsonage-house, if

[k] Co. Litt. 300.

[l] These are very numerous: but there are few which can be relied on with certainty. Among these are bishop Gibson's *codex*, Dr. Burn's *ecclesiastical law*, and the earlier editions of the *clergyman's law*, published under the name of Dr. Watson, but compiled by Mr. Place, a barrister.

[m] Stat. 25 Hen. VIII. c. 16; 33 Hen. VIII. c. 28.

[n] Stat. 28 Hen. VIII. c. 13.

(13) By 1 & 2 Vict. c. 106; 21 Hen. 8, c. 13, and 57 Geo. 3, c. 99, (which had amended and consolidated the law on this subject), were repealed, except as to penalties already incurred and licenses already granted under them; and by sect. 32, it was enacted, that if any spiritual person holding any benefice shall fail to keep residence on his benefice as directed by the act, except with license or dispensation as allowed in the act, he shall, when such absence shall exceed three months and not exceed six months, forfeit one-third part of the annual value of the benefice so neglected; and when such absence shall exceed six months and not exceed eight months, one-half part of such annual value; and when such absence shall exceed eight months, two-thirds of such annual value; and when such absence shall have been for the whole year, three-fourth parts of such annual value. As to monitions and sequestrations in order to enforce residence, see sect. 54.

there be one; for it hath been resolved [o], that the statute intended residence, not only for serving the cure, and for hospitality; but also for maintaining the house, that the successor also may keep hospitality there; and if there be no parsonage-house, it hath been holden that the incumbent is bound to hire one, in the same or some neighbouring parish, to answer the purposes of residence. For the more effectual promotion of which important duty among the parochial clergy, a provision is made by the statute 17 Geo. III. c. 53, for raising money upon ecclesiastical benefices, to be paid off by annually decreasing instalments, and to be expended in rebuilding or repairing the houses belonging to such benefices [14].

How parsons and vicars cease to be such.

We have seen that there is but one way whereby one may become a parson or vicar: there are many ways by which one may cease to be so. 1. By death. 2. By cession, in taking another benefice. For by statute 21 Hen. VIII. c. 13, if any one having a benefice of 8*l.* *per annum*, or upwards, according to the present valuation in the king's books [p], accepts any other, the first shall be adjudged void, unless he obtains a dispensation, which no one is entitled to have but the chaplains of the king, and others therein mentioned, the brethren and sons of lords and knights, and doctors and bachelors of divinity and law, *admitted by the universities*, of this realm. And a vacancy thus made, for want of a dispensation, is called cession [15]. 3. By consecration; for, as was mentioned before [q], when a clerk is promoted to a bishoprick,

[o] 6 Rep. 21. [p] Cro. Car. 456. [q] Page 383.

(14) As to the providing proper residences for the beneficed clergy, see 1 & 2 Vict. cc. 22, 29, & 106, ss. 62—74, extending and amending the powers for that purpose given by 17 Geo. 3, c. 53, and 21 Geo. 3, c. 66; and as to the exchange of glebe lands, see 55 Geo. 3, c. 147; 56 Geo. 3, c. 52; 1 Geo. 4, c. 6, and 1 & 2 Vict. c. 106, ss. 17—27.

(15) By sect. 11, of 1 & 2 Vict. c. 106, the acceptance of preferment by any spiritual person holding any other preferment or benefice vacates the former preferment. It has been already observed, that 21 Hen. 8, c. 13, has been repealed by 57 Geo. 3, c. 99, and 1 & 2 Vict. c. 106; under the latter of which statutes only dispensations to hold two livings are now grantable, see sects. 6 & 7. Under this act two preferments cannot in general be held by the same person, unless the benefices be within ten miles of each other (sect. 3); or if the population of one such benefice exceed three thousand or their joint yearly value exceed 1000*l.* (sect. 4); unless the yearly value of one of such benefices be less than 150*l.* and its population exceed two thousand, in which case the two may be held jointly (sect. 5).

all his other preferments are void the instant that he is consecrated. But there is a method, by the favour of the crown, of holding such living *in commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This may be temporary for one, two, or three years; or perpetual: being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*. There is also a *commenda recipere*, which is, to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to the same; and this is the same to him as institution and induction are to another clerk [q] [16]. 4. By resignation. But this is of no avail, till accepted by the ordinary; into whose hands the resignation must be made [r]. 5. By deprivation, either, first, by sentence declaratory in the ecclesiastical court, for fit and sufficient causes allowed by the common law; such as attainder of treason or felony [s], or conviction of other infamous crime in the king's courts; for heresy, infidelity [t], gross immorality, and the like; or, secondly, in pursuance of divers penal statutes, which declare the benefice void for some nonfeasance or neglect, or else some malefeasance or crime; as, for simony [v]; for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common prayer [u]; for neglecting after institution to read the liturgy and articles in the church, or make the declarations against popery, or take the abjuration oath [w]; for using any other form of prayer than the liturgy of the church of England; [x] or for absenting himself sixty days in one year from a benefice belonging to a popish patron, to which the clerk was presented by either of the universities [y]; in all which and similar cases [z] the benefice is *ipso facto* void, without any formal sentence of deprivation.

[393]

[q] Hob. 144.
[r] Cro. Jac. 198.
[s] Dyer, 108; Jenk. 210.
[t] Fitz. Abr. t. Trial, 54.
[v] Stat. 31 Eliz. c. 6; 12 Ann. c. 12.
[u] Stat. 1 Eliz. c. 1, 2; 13 Eliz. c. 12.
[w] Stat. 13 Eliz. c. 12; 14 Car. II. c. 4; 1 Geo. I. st. 2, c. 13.
[x] Stat. 1 Eliz. c. 2.
[y] Stat. 1 Wm. & M. c. 26.
[z] 6 Rep. 29, 30.

(16) By sect. 18, of 6 & 7 Wm. 4, c. 77, it was enacted, that no commendams should be in future held by any bishop.

VI. Curates.

VI. A curate is the lowest degree in the church; being in the same state that a vicar was formerly, an officiating temporary minister, instead of the proper incumbent. Though there are what are called *perpetual* curacies, where all the tithes are appropriated, and no vicarage endowed (being for some particular reasons [z] exempted from the statute of Hen. IV.), but, instead thereof, such perpetual curate is appointed by the appropriator. With regard to the other species of curates, they are the objects of some particular statutes, which ordain, that such as serve a church during its
[394] vacancy shall be paid such stipend as the ordinary thinks reasonable, out of the profits of the vacancy; or, if that be not sufficient, by the successor within fourteen days after he takes possession: [a] and that if any rector or vicar nominates a curate to the ordinary to be licensed to serve the cure in his absence, the ordinary shall settle his stipend under his hand and seal, not exceeding 50*l. per annum*, nor less than 20*l.* and on failure of payment may sequester the profits of the benefice [b 17].

Thus much of the clergy, properly so called. There are also certain inferior ecclesiastical officers of whom the common law takes notice; and that, principally, to assist the ecclesiastical jurisdiction, where it is deficient in powers: on which officers I shall make a few cursory remarks.

VII. Churchwardens.

VII. Churchwardens are the guardians or keepers of the church, and representatives of the body of the parish [c]. They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs. They are taken, in favour of the church, to be for some purposes a kind

[z] 1 Burn. eccl. law, 427.
[a] Stat. 28 Hen. 8, c. 11.
[b] Stat. 12 Ann. st. 2, c. 12.
[c] In Sweden they have similar officers, whom they call *kiorckiowariandes*. Stiernhook, l. 3, c. 7.

(17) If a non-resident incumbent neglect to appoint a curate, the bishop may appoint one under sect. 75 of 1 & 2 Vict. 106, or if the spiritual duties of any benefice seem to him to be inadequately performed, see ss. 78, 105; as to the stipends of such curates, which must in no case be less than 80*l.* per annum; see sects. 83—92.

of corporation at the common law [18]; that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Yet they may not waste the church goods, but may be removed by the parish, and then called to account by action at the common law; but there is no method of calling them to account, but by first removing them; for none can legally do it, but those who are put in their place. As to lands, or other real property, as the church, churchyard, &c., they have no sort of interest therein; but if any damage is done thereto, the parson only or vicar shall have the action [19]. Their office also is to repair the church, and make rates and levies for that purpose: but these are recoverable only in the ecclesiastical court [20]. They are also joined with the overseers in the care and maintenance of the poor. They are to levy [d] a shilling forfeiture on all such as do not repair to church on Sundays and holidays, and are empowered to keep all persons orderly [395] while there; to which end it has been held that a churchwarden may justify the pulling off a man's hat, without being guilty of either an assault or trespass [e]. There are also a multitude of other petty parochial powers committed to their charge by divers acts of parliament [f].

VIII. Parish clerks and sextons are also regarded by the common law, as persons who have freeholds in their offices; and therefore though they may be punished, yet they cannot

VIII. Parish clerks and sextons.

[d] Stat. 1 Eliz. c. 2.
[e] 1 Lev. 196. [S. C. 1 Saund. 13.]
[f] See Lambard of churchwardens, at the end of his *eirenarcha*; and Dr. Burn, tit. *church, churchwardens, visitations*.

(18) As to the extent to which churchwardens are a corporation, see Rogers' Eccl. Law, tit. Churchwardens.

(19) Formerly the churchwardens as such could not hold lands, a feoffment in trust was therefore necessary to preserve lands given for the benefit of the parish, which trust was from time to time renewed, by putting new trustees in the place of those who died; see 10 B. & C. 885. But by 59 Geo. 3, c. 12, the churchwardens and overseers were empowered to hold such lands in the nature of a body corporate, and also all other buildings, lands, and hereditaments belonging to the parish. Also by 5 & 6 Wm. 4, c. 69, the guardians of the poor of every union or parish are incorporated and enabled to hold lands or hereditaments and other property for the benefit of the union or parish.

(20) By 58 Geo. 3, c. 127, church-rates not exceeding 10*l.* in amount may be recovered summarily before the justices of the peace where the validity of the rate is not disputed.

be deprived, by ecclesiastical censures[g]. The parish clerk was formerly very frequently in holy orders, and some are so to this day. He is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and if such custom appears, the court of king's bench will grant a *mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right[h] (21).

[g] 2 Roll. Abr. 234. [h] Cro. Car. 589.

(21) The 91st canon of 1603 ordains, that no parish clerk shall be chosen within the city of London or elsewhere, but by the parson or vicar; or where there is no parson or vicar, by the minister of that place for the time being, which choice shall be signified by the said minister, vicar, or parson, to the parishioners, the next Sunday following, in the time of divine service. Eight years after this canon, in the 8 Jac. 1, it was decided that the parson, by colour of a new canon, could not deprive the parishioners of their right to choose their parish clerk, 13 Rep. 70; for no canon can repeal the common law; and a parish clerk is a temporal officer and not removable by ecclesiastical authority. The same point was decided, Str. 942. 1108; and see 1 Burr. 367. In Cowp. 370, a mandamus was granted to restore a parish clerk, where it was admitted that the appointment was in the minister.

As to the office of sexton, it has been said that the common law considers it to be a freehold; see 2 Roll. Abr. 234; *Ile's case*, 1 Ventr. 153; but the court doubted this, though they granted a mandamus to restore him upon a certificate that he held the office for life; 3 Bac. Abr. 530; Str. 115. A woman may hold this office. Str. 1114. See further, 1 Cowp. 413; 1 T. R. 20. In 5 Ad. & El. 584; 1 N. & P. 453, it was decided that, where the office is full, the proper mode to try the right is by mandamus, not by quo warranto.

CHAPTER XII.

OF THE CIVIL STATE.

THE lay part of his majesty's subjects, or such of the people as are not comprehended under the denomination of clergy, may be divided into three distinct states, the civil, the military, and the maritime.

That part of the nation which falls under our first and most comprehensive division, the civil state, includes all orders of men, from the highest nobleman to the meanest peasant, that are not included under either our former division, of clergy, or under one of the two latter, the military and maritime states: and it may sometimes include individuals of the other three orders: since a nobleman, a knight, a gentleman, or a peasant, may become either a divine, a soldier, or a seaman.

The civil state consists of the nobility and the commonalty. Of the nobility, the peerage of Great Britain, or lords temporal, as forming (together with the bishops) one of the supreme branches of the legislature, I have before sufficiently spoken: we are here to consider them according to their several degrees, or titles of honour.

All degrees of nobility and honour are derived from the king as their fountain[a]: and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity. Those now in use, are dukes, marquesses, earls, vicounts, and barons[b].

1. A *duke*, though he be with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is Duke. [397]

[a] 4 Inst. 363.

[b] For the original of these titles on the continent of Europe, and their subsequent introduction into this island, see Mr. Selden's *titles of honour*.

superior to all of them in rank; his being the first title of dignity after the royal family [c]. Among the Saxons the Latin name of dukes, *duces*, is very frequent, and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called heretoga [d]; and in the laws of Henry I. (as translated by Lambard) we find them called *heretochii*. But after the Norman conquest, which changed the military polity of the nation, the kings themselves continuing for many generations *dukes* of Normandy, they would not honour any subjects with the title of duke, till the time of Edward III.; who, claiming to be king of France, and thereby losing the ducal in the royal dignity, in the eleventh year of his reign created his son, Edward the black prince, duke of Cornwall: and many, of the royal family especially, were afterwards raised to the like honour [1]. However, in the reign of queen Elizabeth, *A. D.* 1572 [e], the whole order became utterly extinct; but it was revived about fifty years afterwards by her successor, who was remarkably prodigal of honours, in the person of George Villiers duke of Buckingham.

Marquess. 2. A *marquess, marchio*, is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom: which were called the marches, from the Teutonic word, *marche*, a limit: such as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. The persons, who had command there, were called lords marchers, or marquesses; whose authority was abolished by statute 27 Hen. VIII. c. 27: though the title had long before been made a mere ensign of honour; Robert Vere, earl of Oxford, being created marquess of Dublin, by Richard II. in the eighth year of his reign [f].

Earl. 3. An *earl* is a title of nobility so ancient, that its original

[c] Camden. Britan. tit. *ordines*.

[d] This is apparently derived from the same root as the German herzog, the ancient appellation of dukes in that country. Seld. tit. hon. 2, 1, 22.

[e] Camden. Britan. tit. *ordines*; Spelman. Gloss. 191.

[f] 2 Inst. 5.

(1) This order of nobility was instituted by Edw. 3, in 1337, about a year before his claiming to be king of France, "in order to inflame the military ardour and ambition of his earls and barons." See Henry's Hist. of Eng. vol. 8, p. 135; and supra, p. 225, n. 9.

cannot clearly be traced out. Thus much seems tolerably certain: that among the Saxons they are called *ealdormen*, *quasi* elder men, signifying the same as *senior* or *senator* among the Romans; and also *schiremen*, because they had each of them the civil government of a several division or shire. On the irruption of the Danes, they changed the name to *eorles*, which, according to Camden [g], signified the same in their language. In Latin they are called *comites* (a title first used in the empire) from being the king's attendants: "*a societate nomen sumpserunt, reges enim tales sibi associant* [h]." After the Norman conquest they were for some time called *counts* or *countees*, from the French; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The name of *earls* or *comites* is now become a mere title, they having nothing to do with the government of the county; which, as has been more than once observed, is now entirely devolved on the sheriff, the earl's deputy, or *vice-comes*. In writs and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually styles him, "trusty and well-beloved *cousin*:" an appellation as ancient as the reign of Henry IV.: who being either by his wife, his mother, or his sisters, actually related or allied to every earl then in the kingdom, artfully and constantly acknowledged that connexion in all his letters and other public acts: from whence the usage has descended to his successors, though the reason has long ago failed. [398]

4. The name of *vice-comes* or *viscount* was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it, by Henry the Sixth; when, in the eighteenth year of his reign, he created John Beaumont a peer, by the name of viscount Beaumont, which was the first instance of the kind [i]. Viscount.

5. A *baron's* is the most general and universal title of nobility; for originally every one of the peers of superior rank had also a barony annexed to his other titles [k]. But it hath sometimes happened that, when an ancient baron hath been raised to a new degree of peerage, in the course of a few generations the two titles have descended differently; Baron. [399]

[g] Britan. tit. *ordines*.
[h] Bracton, l. 1, c. 8; Flet. l. 1, c. 5.
[i] 2 Inst. 5.
[k] 2 Inst. 5, 6.

one perhaps to the male descendants, the other to the heirs general; whereby the earldom or other superior title hath subsisted without a barony: and there are also modern instances, where earls and viscounts have been created without annexing a barony to their other honours: so that now the rule doth not hold universally, that all peers are barons. The original and antiquity of baronies have occasioned great inquiries among our English antiquaries. The most probable opinion seems to be, that they were the same with our present lords of manors; to which the name of court baron (which is the lord's court, and incident to every manor) gives some countenance. It may be collected from king John's *magna charta* [l], that originally all lords of manors, or barons, that held of the king *in capite*, had seats in the great council or parliament: till about the reign of that prince the conflux of them became so large and troublesome, that the king was obliged to divide them, and summon only the greater barons in person; leaving the small ones to be summoned by the sheriff, and (as it is said) to sit by representation in another house; which gave rise to the separation of the two houses of parliament [m]. By degrees the title came to be confined to the greater barons, or lords of parliament only; and there were no other barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till Richard the Second first made it a mere title of honour, by conferring it on divers persons by his letters patent [n].

How nobility is created.

Having made this short inquiry into the original of our several degrees of nobility, I shall next consider the manner in which they may be created. The right of peerage seems to have been originally territorial; that is, annexed to lands, honours, castles, manors, and the like, the proprietors and possessors of which were (in right of those estates) allowed to
[400] be peers of the realm, and were summoned to parliament to do suit and service to their sovereign: and, when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the house of lords in right of succession to certain ancient baronies annexed, or supposed to be

[l] Cap. 14.
[m] Gilb. hist. of exch. c. 3; Seld. tit. of hon. 2, 5, 21.
[n] 1 Inst. 9; Seld. Jan. Angl. 2, § 66.

annexed, to their episcopal lands[o]: and thus, in 11 Hen. VI., the possession of the castle of Arundel was adjudged to confer an earldom on its possessor[p]. But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial became personal. Actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament; but the record of the writ of summons to him or his ancestors was admitted as a sufficient evidence of the tenure.

Peers are now created either by writ, or by patent: for those who claim by prescription must suppose either a writ or patent made to their ancestors; though by length of time it is lost. The creation by writ, or the king's letter, is a summons to attend the house of peers, by the style and title of that barony, which the king is pleased to confer: that by patent is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually takes his seat in the house of lords: and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct parliaments, to evidence an hereditary barony[q]: and therefore the most usual, because the surest, way is to grant the dignity by patent, which enures to a man and his heirs according to the limitations thereof, though he never himself makes use of it[r]. Yet it is frequent to call up the eldest son of a peer to the house of lords by writ of summons, in the name of his father's barony: because in that case there is no danger of his children's losing the nobility in case he never takes his seat; for they will succeed to their grandfather. Creation by writ has also one advantage over that by patent: for a person created by writ holds the dignity to him *and his heirs*, without any words to that purport in the [401] writ[2]; but in letters patent there must be words to direct the

[o] Glan. l. 7, c. 1.
[p] Seld. tit. of hon. b. 2, c. 9, § 5.
[q] Whitelocke of parl. ch. 114.
[r] Co. Litt. 16.

(2) Lord Coke's opinion in the passage referred to by Blackstone (Co. Litt. 16, b.), that if a man having been summoned by writ to parliament, once sit in the house of peers, he shall hold the dignity to him and his heirs, though there be no words of inheritance in the writ, is now understood to be erroneous; see further on this subject, Sullivan's Lect. 190; Com. Dig. Dignity, C. 3, and 1 Wooddeson's Lect. 37.

inheritance, else the dignity enures only to the grantee for life [r]. For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs: as where a peerage is limited to a man, and the heirs male of his body by Elizabeth his present lady, and not to such heirs by any former or future wife.

The incidents of nobility.

Let us next take a view of a few of the principal incidents attending the nobility, exclusive of their capacity as members of parliament, and as hereditary counsellors of the crown; both of which we have before considered. And first we must observe, that in criminal cases a nobleman shall be tried by his peers [3]. The great are always obnoxious to popular envy: were they to be judged by the people, they might be in danger from the prejudice of their judges; and would moreover be deprived of the privilege of the meanest subjects, that of being tried by their equals, which is secured to all the realm by *magna charta*, c. 29. It is said, that this does not extend to bishops: who, though they are lords of parliament, and sit there by virtue of their baronies which they hold *jure ecclesiæ*, yet are not ennobled in blood, and consequently not peers with the nobility [s]. As to peeresses, there was no precedent for their trial when accused of treason or felony, till after Eleanor duchess of Gloucester, wife to the lord protector, was accused of treason and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 Hen. VI. c. 9, which declares [t] the law to be, that

[r] Co. Litt. 9, 16.
[s] 3 Inst. 30, 31.
[t] Moor. 769; 2 Inst. 50; 6 Rep. 52; Staundf. P. C. 152.

(3) But this is only in treason, felony, and misprision of the same; for in misdemeanors and appeals of felony, a peer is tried like a commoner; see Mag. Chart. 9 Hen. 3, c. 29; 2 Inst. 49; 3 Inst. 30; 9 Rep. 30; Hawk. P. C. b. 2, c. 44, ss. 13, 14. It seems that a peer cannot waive his privilege; see Kel. 56; 1 St. Tr. 265; 2 Rush. 64. If he refuse to plead or pray trial by his peers, he may be dealt with as a commoner who stands mute; and if he be indicted as a commoner and plead and pray trial by "the country," he cannot afterwards be tried by his peers; see Hawk. P. C. b. 2, c. 44, s. 19.

The peers of Scotland and Ireland have all the privileges of the peers of England, except as before noticed, supra, pp. 97, 99, n. 12, art. 4, and p. 165, n. 26. Foreign noblemen have no privileges in this country as such, see Co. Lit. 156; 2 Inst. 48; Lex Const. 80, 81; being, as Blackstone observes, infra, p. 406, in the eye of the law, only esquires.

peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm. If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers: but if she be only noble by marriage, then by a second marriage with a commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost [u]. Yet if a duchess dowager marries a baron, she continues a duchess still; for all the [402] nobility are *pares*, and therefore it is no degradation [v]. A peer, or peeress (either in her own right or by marriage,) cannot be arrested in civil cases [w]: and they have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A peer sitting in judgment, gives not his verdict upon oath, like an ordinary juryman, but, upon his honour [ww]: he answers also to bills in chancery upon his honour, and not upon his oath [x]; but, when he is examined as a witness either in civil or criminal cases, he must be sworn [y]: for the respect, which the law shews to the honour of a peer, does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis* [z]. The honour of peers is however so highly tendered by the law, that it is much more penal to spread false reports of them and certain other great officers of the realm, than of other men: scandal against them being called by the peculiar name of *scandalum magnatum*, and subjected to peculiar punishments by divers ancient statutes [a].

How nobility may be lost.

A peer cannot lose his nobility, but by death or attainder; though there was an instance in the reign of Edward the Fourth of the degradation of George Nevile duke of Bedford, by act of parliament [b], on account of his poverty, which rendered him unable to support his dignity [c]. But this is a singular instance: which serves at the same time, by having

[u] Dyer, 79; Co. Litt. 16.
[v] 2 Inst. 50.
[w] Finch. L. 355; 1 Vent. 298.
[ww] 2 Inst. 49.
[x] 1 P. Wms. 146.
[y] Salk. 512.
[z] Cro. Car. 64.
[a] 3 Edw. I. c. 34; 2 Ric. II. st. 1, c. 5; 12 Ric. II. c. 11.
[b] 4 Inst. 355.
[c] The preamble to the act is remarkable; "forasmuch as oftentimes it is seen, that when any lord is called to high estate, and hath not convenient livelihood to support the same dignity, it induceth great poverty and indigence, and causeth oftentimes great extortion, embracery, and maintenance to be had; to the great trouble of all such countries where such estate shall happen to be; therefore, &c."

happened, to shew the power of parliament; and, by having happened but once, to shew how tender the parliament hath been, in exerting so high a power. It hath been said indeed [d], that if a baron wastes his estate, so that he is not able to support the degree, the *king* may degrade him: but it is expressly held by later authorities [e], that a peer cannot be degraded but by act of *parliament* [4].

On the commonalty. [403]

The commonalty, like the nobility, are divided into several degrees; and as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility [f].

Vidames.

The first name of dignity, next beneath a peer, was anciently that of *vidames, vice-domini,* or *valvasors* [g]: who are mentioned by our ancient lawyers [h] as *viri magnæ dignitatis;* and sir Edward Coke [i] speaks highly of them. Yet they are now quite out of use; and our legal antiquaries are not agreed upon even their original or ancient office.

Knights.

Now therefore the first personal dignity, after the nobility, is a *knight* of the order of St. George, or *of the garter;* first instituted by Edward III., *A. D.* 1344 [k]. Next (but not till after certain *official* dignities, as privy counsellors, the chancellors of the exchequer and duchy of Lancaster, the chief justice of the king's bench, the master of the rolls, and the other English judges) follows a *knight banneret;* who indeed by statutes 5 Ric. II. st. 2, c. 4, and 14 Ric. II. c. 11, is ranked next after barons; and his precedence before the younger sons of viscounts was confirmed to him by order of king James I., in the tenth year of his reign [l]. But in order to

[d] Moor. 678.
[e] 12 Rep. 107; 12 Mod. 56.
[f] 2 Inst. 29.
[g] Camden. Britan. tit. *ordines.*
[h] Bracton, l. 1, c. 8.
[i] 2 Inst. 667.
[k] Seld. tit. of hon. b. 2, c. 5, § 41.
[l] Ibid. b. 2, c. 11, § 3.

(4) Doubts having been raised on the occasion of the recent trial of Lord Cardigan for felony, under 1 Vict. c. 85, whether 7 & 8 Geo. 4 c. 28, had deprived peers of the benefit of clergy, it was enacted by 4 & 5 Vict. c. 22, that every lord of parliament or peer of this realm, having place and voice in parliament, against whom any indictment for felony may be found, shall plead thereto and shall upon conviction be liable to the same punishment as any other of her Majesty's subjects may be liable to upon conviction for such felony, any law or usage to the contrary in anywise notwithstanding.

entitle himself to this rank, he must have been created by the king in person, in the field, under the royal banners, in time of open war[m]. Else he ranks after *baronets;* who are the next order; which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by king James the First, *A. D.* 1611; in order to raise a competent sum for the reduction of the province of Ulster in Ireland; for which reason all baronets have the arms of Ulster superadded to their family coat. Next follow *knights of the bath;* an order instituted by king Henry IV. and revived by king George the First. They are [404] so called from the ceremony of bathing the night before their creation. The last of these inferior nobility are *knights bachelors;* the most ancient, though the lowest order of knighthood amongst us; for we have an instance[n] of king Alfred's conferring this order on his son Athelstan. The custom of the ancient Germans was to give their young men a shield and a lance in the great council: this was equivalent to the *toga virilis* of the Romans: before this they were not permitted to bear arms, but were accounted as part of the father's household; after it, as part of the community[o]. Hence some derive the usage of knighting, which has prevailed all over the western world, since its reduction by colonies from those northern heroes. Knights are called in Latin *equites aurati; aurati* from the gilt spurs they wore; and *equites* because they always served on horseback: for it is observable[p], that almost all nations call their knights by some appellation derived from an horse[5]. They are also called in our law *milites,* because they formed a part of the royal army, in virtue of their feudal tenures; one condition of which was, that every one who held a knight's fee immediately under the crown (which in Edward the Second's time[q] amounted to 20*l. per annum*) was obliged to be knighted, and attend the king

[m] 4 Inst. 6.
[n] Will. Malmsb. lib. 2.
[o] Tac. de Morib. Germ. 13.
[p] Camd. ibid.; Co. Litt. 74.
[q] Stat. de milit. 1 Ed. II.

(5) It does not appear that the English word *knight* has any reference to a horse; for knight or cnipt in the Saxon, signifies puer, servus, or attendant; see Seld. tit. of hon. b. 2, c. 5, § 33.

in his wars, or fine for his non-compliance. The exertion of this prerogative as an expedient to raise money in the reign of Charles the First, gave great offence; though warranted by law, and the recent example of queen Elizabeth; but it was by the statute 16 Car. I. c. 16, abolished; and this kind of knighthood has, since that time, fallen into great disregard.

Colonels, serjeants at law, and doctors.

[405]

These, sir Edward Coke says[r], are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*. But before these last the heralds rank all colonels, serjeants at law, and doctors in the three learned professions[s].

[r] 2 Inst. 667.

[s] The rules of precedence in England may be reduced to the following table: in which those marked * are entitled to the rank here allotted them, by statute 31 Hen. VIII. c. 10,—marked †, by statute 1 W. & M. c. 21, marked ‖, by letters patent, 9, 10, and 14 Jac. I. which see in Seld. tit. of hon. II. 5, 46, and II. 11, 3,—marked ‡, by ancient usage and established custom; for which see (among others) Camden's Britan. tit. *ordines*. Milles's catalogue of honour, edit. 1610, and Chamberlayne's present State of England, p. 3, ch. 3.

TABLE OF PRECEDENCE.

6

* The king's children and grandchildren.
* ——— brethren.
* ——— uncles.
* ——— nephews.
* Archbishop of Canterbury 7.
* Lord chancellor or keeper, if a baron.
* Archbishop of York.
* Lord treasurer.
* Lord president of the council.
* Lord privy seal.

} if barons.

(6) His Royal Highness Prince Albert, vide supra, p. 272, n. 30.

(7) It is said, that before the conquest, by a constitution of pope Gregory, the two archbishops were equal in dignity, and in the number of bishops subject to their authority; and that William the Conqueror thought it prudent to give precedence and superiority to the archbishop of Canterbury; but Thomas archbishop of York was unwilling to acknowledge his inferiority to Lanfranc archbishop of Canterbury, and appealed to the pope, who referred the matter to the king and barons; and in a council held at Windsor Castle, they decided in favour of the archbishop of Canterbury; see Godw. Comm. de Præsul. 665. But the archbishop of York long afterwards refused to acquiesce in this decision, for bishop Godwin relates a curious and ludicrous struggle which took place in the reign of Hen. 2, above one hundred years afterwards between Roger archbishop of York and Richard archbishop of Canterbury, for the chair on the right hand of the pope's legate. (Ib. 79). Perhaps to this decision, and their former equality, we may refer the present distinction between them; viz., that the archbishop of Canterbury is primate of all England, and the archbishop of York is primate of England. —[CHRISTIAN].

Esquires and gentlemen are confounded together by sir Edward Coke, who observes[5], that every esquire is a gentleman, and a gentleman is defined to be one *qui arma gerit*, Esquires and gentlemen.

* Lord great chamberlain. But see private stat. 1 Geo. I. c. 3.
* Lord high constable.
* Lord marshal.
* Lord admiral.
* Lord steward of the household.
* Lord chamberlain of the household.

above all peers of their own degree.

* Dukes.
* Marquesses.
‡ Dukes' eldest sons.
* Earls.
‡ Marquesses' eldest sons.
‡ Dukes' younger sons.
* Viscounts.
‡ Earls' eldest sons.
‡ Marquesses' younger sons.
* Secretary of state, if a bishop.
* Bishop of London.
* ——— Durham.
* ——— Winchester.
* Bishops.
* Secretary of state, if a baron.
* Barons.
† Speaker of the house of commons.
† Lords commissioners of the great seal.
‡ Viscounts' eldest sons.
‡ Earls' younger sons.
‡ Barons' eldest sons.
‖ Knights of the garter.
‖ Privy counsellors.
‖ Chancellor of the exchequer.
‖ Chancellor of the duchy.
‖ Chief justice of the king's bench.
‖ Master of the rolls [8].
‖ Chief justice of the common pleas.
‖ Chief baron of the exchequer [9].
‖ Judges and barons of the coif.
‖ Knights bannerets royal.
‖ Viscounts' younger sons.
‖ Barons' younger sons.
‖ Baronets.
‖ Knights bannerets.
‡ Knights of the bath.
‡ Knights bachelors.
‖ Baronets' eldest sons.
‖ Knights' eldest sons.
‖ Baronets' younger sons.
‖ Knights' younger sons.
‡ Colonels.
‡ Serjeants at law [10].
‡ Doctors.
‡ Esquires.
‡ Gentlemen.
‡ Yeomen.
‡ Tradesmen.
‡ Artificers.
‡ Labourers.

N. B. Married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves, except such rank is merely professional or official;—and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers.

[5] 2 Inst. 668.

(8) The vice-chancellor of England appointed under 53 Geo. 3, c. 24, takes precedence next after the master of the rolls; see sect. 4, of the act.

(9) The vice-chancellors appointed under 5 Vict. c. 5, take precedence next after the lord chief baron of the exchequer; see sect. 25 of the act.

(10) As to the precedence of serjeants-at-law, see 7 Car. & Payne, 371, note (*a*).

who bears coat armour, the grant of which adds gentility to a man's family; in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the image of one ancestor at least, who had borne some curule office. It is indeed a matter somewhat unsettled, what constitutes the distinction, or who is a real *esquire*; for it is not an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them[t]: 1. The eldest sons of knights, and their eldest sons in perpetual succession[u]. 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession: both which species of esquires sir Henry Spelman entitles *armigeri natalitii*[w]. 3. Esquires created by the king's letters patent or other investiture, and their eldest sons. 4. Esquires by virtue of their offices: as justices of the peace, and others who bear any office of trust under the crown. To these may be added the esquires of knights of the bath, each of whom constitutes three at his installation: and all foreign, nay, Irish peers[11]; for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings[x]. As for *gentlemen*, says sir Thomas Smith[y], they be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and (to be short) who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman. A *yeoman* is he that hath free land of forty shillings by the year; who was anciently thereby qualified to serve on juries, vote for knights of the shire, and do any other act, where the law requires one that is *probus et legalis homo*[z].

Yeomen.

[407]

The rest of the commonalty are *tradesmen, artificers*, and

Tradesmen, artificers, and labourers.

[t] 2 Inst. 668.
[u] 2 Inst. 667.
[w] Glost. 43.
[x] 3 Inst. 30; 2 Inst. 667.
[y] Commonw. of England, b. 1, c. 20.
[z] 2 Inst. 668.

(11) Vide supra, p. 402, note 3.

labourers; who (as well as all others) must in pursuance of the statute 1 Hen. V. c. 5, be styled by the name and addition of their estate, degree, or mystery, and the place to which they belong, or where they have been conversant, in all original writs of actions personal, appeals, and indictments, upon which process of outlawry may be awarded; in order, as it should seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of its process.

CHAPTER XIII.

OF THE MILITARY AND MARITIME STATES.

Military state.

THE military state includes the whole of the soldiery, or such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm.

In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear; but in free states the profession of a soldier, taken singly and merely as a profession, is justly an object of jealousy. In these no man should take up arms, but with a view to defend his country and its laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier. The laws therefore and constitutions of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war: and it was not till the reign of Henry VII. that the kings of England had so much as a guard about their persons[1].

Yeomen of the guard.

(1) The yeomen of the guard established by Hen. 7, in 1485, can scarcely be considered the original of our military state; for they were only a particular class of the king's domestic servants. Their number was at first fifty, and seems never to have exceeded two hundred. (Hallam. Con. His. ii. 180). Regular troops, however, of some sort must have been maintained in those fortified places, where some show of defence has been always kept up; as the Tower of London, Portsmouth, the Castle of Dover, the fort of Tilbury, and, before the union of the crowns, Berwick and some other places on the Scottish border. Little is now known as to the nature of these garrisons; except that they were chiefly accustomed to the use of artillery, and that their whole number must have been insignificant, and probably at no time equal to resist any serious attack.

In the time of our Saxon ancestors, as appears from Edward the Confessor's laws[a], the military force of this kingdom was in the hands of the dukes or heretochs, who were constituted through every province and county in the kingdom; being taken out of the principal nobility, and such as were most remarkable for being "*sapientes, fideles, et animosi.*" Their duty was to lead and regulate the English armies, with a very unlimited power; "*prout eis visum fuerit, ad honorem coronæ et utilitatem regni.*" And because of this great power they were elected by the people in their full assembly, or folkmote, in the same manner as sheriffs were elected: following still that old fundamental maxim of the Saxon constitution, that where any officer was intrusted with such power, as if abused might tend to the oppression of the people, that power was delegated to him by a vote of the people themselves[b]. So too, among the ancient Germans, the ancestors of our Saxon forefathers, they had their dukes as well as kings, with an independent power over the military, as the kings had over the civil state. The dukes were elective, the kings hereditary: for so only can be consistently understood that passage of Tacitus[c] *reges ex nobilitate, duces ex virtute sumunt;*" in constituting their kings, the family or blood-royal was regarded, in choosing their dukes or leaders, warlike merit: just as Cæsar relates of their ancestors in his time, that whenever they went to war, by way either of attack or defence, they *elected* leaders to command them[d]. This large share of power, thus conferred by the people, though intended to preserve the liberty of the subject, was perhaps unreasonably detrimental to the prerogative of the crown; and accordingly we find a very ill use made of it by Edric duke of Mercia, in the reign of king Edmund Ironside, who, by his office of duke or heretoch, was entitled to a large command in the king's army, and by his repeated treacheries at last transferred the crown to Canute the Dane.

[409] On the Saxon military force.

[410]

It seems universally agreed by all historians, that king

[a] c. *de heretochiis.*

[b] "*Isti vero viri eliguntur per commune concilium, pro communi utilitate regni, per provincias et patrias universas, et per singulos comitatus in pleno folkmote, sicut et vicecomites provinciarum et comitatuum eligi debent.*" LL. Edw. Confess. ibid. See also Bede, eccl. hist. l. 5, c. 10.

[c] De Morib. Germ. 7.

[d] "*Quum bellum civitas aut illatum defendit aut infert, magistratus qui ei bello præsint deliguntur.*" De bell. Gall. l. 6, c. 22.

Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers; but we are unfortunately left in the dark as to the particulars of this his so celebrated regulation; though, from what was last observed, the dukes seem to have been left in possession of too large and independent a power; which enabled duke Harold, on the death of Edward the Confessor, though a stranger to the royal blood, to mount, for a short space, the throne of this kingdom, in prejudice of Edgar Atheling, the rightful heir.

On the military part of the feudal system.

Upon the Norman conquest the feodal law was introduced here in all its rigour, the whole of which is built on a military plan. I shall not now enter into the particulars of that constitution, which belongs more properly to the next part of our Commentaries; but shall only observe, that in consequence thereof all the lands in the kingdom were divided into what were called knight's fees, in number above sixty thousand; and for every knight's fee a knight or soldier, *miles*, was bound to attend the king in his wars, for forty days in a year; in which space of time, before war was reduced to a science, the campaign was generally finished, and a kingdom either conquered or victorious[e]. By this means the king had, without any expense, an army of sixty thousand men always ready at his command. And accordingly we find one, among the laws of William the Conqueror[f], which in the king's name commands and firmly enjoins the personal attendance of all knights and others; "*quod habeant et teneant se semper in armis et* [411] *equis, ut decet et oportet: et quod semper sint prompti et parati ad servitium suum integrum nobis explendum et peragendum, cum opus adfuerit, secundum quod debent de feodis et tenementis suis de jure nobis facere.*" This personal service in process of time degenerated into pecuniary commutations or aids, and at last the military part[2] of the feodal system was abolished at the Restoration, by statute 12 Car. II. c. 24.

[e] The Poles are, even at this day, so tenacious of their ancient constitution, that their pospolite, or militia, cannot be compelled to serve above six weeks, or forty days, in a year. Mod. Un. Hist. xxxiv. 12.

[f] c. 58; see Co. Litt. 75, 76.

(2) The military part of the feodal system had been abolished in the reign of Hen. 2, when personal service in the king's wars was first allowed to be commuted by a pecuniary payment. It was the military tenures which were abolished by 12 Car. 2, c. 24. (Vide infra, b. ii. c. v.)

In the mean time we are not to imagine that the kingdom was left wholly without defence in case of domestic insurrections, or the prospect of foreign invasions. Besides those who by their military tenures were bound to perform forty days' service in the field, first the assize of arms, enacted[g] 27 Hen. II. and afterwards the statute of Winchester[h], under Edward I. obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace: and constables were appointed in all hundreds by the latter statute to see that such arms were provided. These weapons were changed by the statute 4 & 5 Ph. & M. c. 2, into others of more modern service; but both this and the former provisions were repealed in the reign of James I.[i] While these continued in force, it was usual from time to time for our princes to issue commissions of array, and send into every county officers in whom they could confide to muster and array (or set in military order) the inhabitants of every district; and the form of the commission of array was settled in parliament in the 5 Hen. IV., so as to prevent the insertion therein of any new penal clauses[k]. But it was also provided[l], that no man should be compelled to go out of the kingdom at any rate, nor out of his shire but in cases of urgent necessity; nor should provide soldiers unless by consent of parliament. About the reign of king

On the statutes of armour.

[g] Hoved. A.D. 1181.

[h] 13 Edw. I. c. 6.

[i] Stat. 1 Jac. I. c. 25; 21 Jac. I. c. 28.

[k] Rushworth, part 3, pp. 662, 667; see 8 Rym. 374, &c.

[l] Stat. 1 Edw. III. st. 2, cc. 5, 7; 25 Edw. III. st. 5, c. 8 [3].

(3) The former of these statutes was intended to put a stop to the proclamations, which, especially in the reigns of Edw. 1 and Edw. 2 (Rym. Fœd. passim), had been issued to the sheriffs, directing them to notify to all persons of sufficient estate that they must hold themselves ready to attend the king whenever he should require their service. These arbitrary conscriptions being thus checked by the parliament, Edw. 3 had recourse to another mode of levying soldiers, without his own cost, by calling on every county and principal town to furnish a specified number of troops. Against this, the parliament provided a remedy in the latter of the above-cited statutes, which enacts, "that no man shall be constrained to find men at arms, hoblers, nor archers, other than those who hold by such service, if it be not by common consent and grant in parliament." Both these statutes were recited and confirmed by 4 Hen. 4, c. 13. We are indebted to Mr. Hallam for an excellent historical sketch of the rise and progress of the military state in England; see Con. His. vol. ii. 176—184.

[412] Henry VIII., or his children, lieutenants began to be introduced[m], as standing representatives of the crown, to keep the counties in military order; for we find them mentioned as known officers in the statute 4 & 5 Ph. & M. c. 3, though they had not then been long in use, for Camden speaks of them[n] in the time of queen Elizabeth, as extraordinary magistrates constituted only in times of difficulty and danger; but the introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse.

The militia under Charles I.

In this state things continued, till the repeal of the statutes of armour in the reign of king James the First: after which, when king Charles the First had, during his northern expeditions, issued commissions of lieutenancy, and exerted some military powers, which, having been long exercised, were thought to belong to the crown, it became a question in the long parliament, how far the power of the militia did inherently reside in the king; being now unsupported by any statute, and founded only upon immemorial usage. This question, long agitated with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the king and his parliament: the two houses not only denying this prerogative of the crown, the legality of which perhaps might be somewhat doubtful[4]; but also seising into their own hands the entire power of the militia, of the illegality of which step could never be any doubt at all.

The abolition of military tenures.

Soon after the restoration of king Charles the Second, when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognize the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination[o]; and the order in which the militia now stands by law is [413] principally built upon the statutes which were then enacted. It is true the two last of them are apparently repealed; but

[m] 15 Rym. 75.
[n] Brit. 103, edit. 1594.
[o] 13 Car. II. st. 1, c. 6; 13 & 14 Car. II. c. 3; 15 Car. II. c. 4.

(4) It was clearly contrary to the statutes of Edw. 3 and Hen. 4, though it seemed to be, in some degree, sanctioned by the 4 & 5 Ph. & M. c. 3; which, without repealing or adverting to those statutes, seems to recognize the right of the crown to levy men for service in war, by imposing penalties on all who absent themselves from the musters held for that purpose.

many of their provisions are re-enacted, with the addition of some new regulations, by the present militia laws; the general scheme of which is to discipline a certain number of the inhabitants of every county, chosen by lot for three years[5]; and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders, under a commission from the crown. They are not compellable to march out of their counties, unless in case of invasion or actual rebellion within the realm (or any of its dominions or territories[p]), nor in any case compellable to march out of the kingdom. They are to be exercised at stated times: and their discipline in general is liberal and easy; but, when drawn out into actual service, they are subject to the rigour of martial law, as necessary to keep them in order. This is the constitutional security which our laws[p] have provided for the public peace, and for protecting the realm against foreign or domestic violence[6]. The present militia laws.

When the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary, than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the raising of armies, and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excresences bred out of the distemper of the state, and not On the regular troops.

[p] Stat. 16 Geo. III. c. 3.
[q] 2 Geo. III. c. 20; 9 Geo. III. c. 42; 16 Geo. III. c. 3; 18 Geo. III. cc. 14 & 59; 19 Geo. III. c. 72.

(5) The period of service in the militia was increased to five years by 26 Geo. 3, c. 107.

(6) The militia have since the time of Blackstone, been regulated by various enactments; for which, see Burn's Justice, tit. Militia, Military Law. They are, while on actual service, subject to the Mutiny Act and the articles of war framed under its authority, except as regards punishment affecting life or limb, see 42 Geo. 3, c. 90, ss. 89, 103; 55 Geo. 3, c. 65, s. 4; c. 168, ss. 1, 2. Since the nation has ceased to be apprehensive of invasion, this branch of our military state has been disembodied and the making of lists and the ballots and enrolments for the militia suspended by a succession of annual acts of parliament, the last of which is 6 & 7 Vict. c. 43. Their pay, clothing, contingent, and other expenses, and the allowances granted to the subaltern and other officers, are provided for also by a succession of annual acts of parliament, the last of which is 6 & 7 Vict. c. 70.

As to the yeomanry and volunteer corps, which originated in the fear of French invasion, but are now for the most part laid aside, the reader may consult 43 Geo. 3, cc. 96, 120, 124; 44 Geo. 3, c. 54; 53 Geo. 3, c. 81; 56 Geo. 3, c. 39; 57 Geo. 3, c. 44; 7 Geo. 4, c. 58.

as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as sir Matthew Hale observes[q], in truth and reality no law, but something indulged rather than allowed as a law[7]. The necessity of

[q] Hist. C. L. c. 2.

(7) "Martial law," said Lord Loughborough (2 H. Bl. 98), "such as it is described by Lord Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all. Where martial law is established and prevails in any country, it is of a totally different nature from that which is inaccurately called 'martial law,' merely because the decision is by a court martial; but which bears no affinity to that which was attempted to be exercised in this kingdom, which was contrary to the constitution and which has been for a century totally exploded. Where martial law prevails, the authority under which it is exercised claims a jurisdiction over all military persons under all circumstances. Even their debts are subject to inquiry by a military authority: every species of offence committed by any person who appertains to the army is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs. It extends also to a great variety of cases, not relating to the discipline of the army, in those states which subsists by military power. Plots against the sovereign, intelligence to the enemy, and the like, are all considered as within the cognizance of military authority. In this country, all the delinquencies of soldiers are not triable, as in most countries of Europe by martial law; but, where they are ordinary offences against the civil peace, they are tried by the common law courts. Therefore it is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain. But there is by the providence and wisdom of the Legislature, an army established in this country of which it is necessary to keep up the establishment; and it is an indispensable requisite of that establishment that order and discipline should be kept up in it, and that the persons, who compose the army, should, for all offences in their military capacity be subject to a trial by their officers. The object of the Mutiny Act, therefore, is to create a court invested with authority to try those who are a part of the army, in all their different descriptions of officers and soldiers, and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the Legislature to his Majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and discipline of the army." To these courts every person in the receipt of pay as a soldier (2 H. Bl. 69), is amenable upon all matters specified in the articles of war; offences against which can be tried by courts martial, and by them alone, the common law courts being no court of appeal from their decisions so long as they act within the limits of the articles of war; see *Sutton* v. *Johnstone*, 1 T. R. 493—550, conf. Dom. Proc. 1 T. R. 784. As to the revision of sentences of courts martial by memorial to the queen in council, see the case of Lieut. Frye, McArthur on Courts Martial, vol. i. App. No. xxiv., and the case of Capt. Coffin, in the same work, vol. ii. p. 290, where the memorial was referred to the judges.

As to courts of inquiry which may

order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for [414] all persons to receive justice according to the laws of the land. Wherefore Thomas earl of Lancaster being condemned at Pontefract, 15 Edw. II., by martial law, his attainder was reversed 1 Edw. III., because it was done in time of peace[r]. And it is laid down[s], that if a lieutenant, or other that hath commission of martial authority, doth in time of peace hang or otherwise execute any man by colour of martial law, this is murder[8]: for it is against *magna charta*[t]. The petition of right[u] moreover enacts, that no soldier shall be quartered on the subject without his own consent[uu 9]: and that no commission shall issue to proceed within this land according to martial law. And whereas, after the Restoration, king Charles the Second kept up about five thousand regular troops, by his own authority, for guards and garrisons; which king James the Second by degrees increased to no less than thirty thousand, all paid from his own civil list; it was made one of the articles of the bill of rights[v], that the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of parliament, is against law.

Origin of our standing army.

But, as the fashion of keeping standing armies (which was first introduced by Charles VII. in France, *A. D.* 1445[w]) has of late years universally prevailed over Europe (though some of its potentates, being unable themselves to maintain them, are obliged to have recourse to richer powers, and receive subsidiary pensions for that purpose), it has also for many

[r] 2 Brad. Append. 59.
[s] 3 Inst. 52.
[t] Cap. 29.
[u] 3 Car. I. c. 1; see also stat. 31 Car. II. c. 1.
[uu] Thus, in Poland, no soldier can be quartered upon the gentry, the only freemen in that republic. Mod. Un. Hist. xxxiv. 23.
[v] Stat. 1 W. & M. st. 2, c. 2.
[w] Robertson, Cha. V. i. 94.

be summoned by the crown to investigate matters not cognizable by a military tribunal, see the arguments in *Home* v. *Bentinck*, 2 Brod. & Bing. 130.

(8) Nevertheless, several instances of arbitrary punishments by martial law have occurred in our history; see Hallam, Con. Hist. i. 325—330, 531.

(9) Innkeepers and victuallers are, however, by the annual Mutiny Act liable to have officers and soldiers quartered or billeted upon them, but only while on the march, and at certain rates of remuneration allowed by the act; see 6 & 7 Vict. c. 3, s. 55.

years past been annually judged necessary by our legislature, for the safety of the kingdom, the defence of the possessions of the crown of Great Britain, and the preservation of the balance of power in Europe, to maintain even in time of peace
[415] a standing body of troops, under the command of the crown; who are however *ipso facto* disbanded at the expiration of every year, unless continued by parliament. And it was enacted by statute 10 W. III. c. 1, that not more than twelve thousand regular forces should be kept on foot in Ireland, though paid at the charge of that kingdom; which permission is extended by statute 8 Geo. III. c. 13, to 16,235 men in time of peace[10].

To prevent the executive power from being able to oppress, says baron Montesquieu[x], it is requisite that the armies with which it is intrusted should consist of the people, and have the same spirit with the people; as was the case at Rome till Marius new-modelled the legions by enlisting the rabble of Italy, and laid the foundation of all the military tyranny that ensued. Nothing then, according to these principles, ought to be more guarded against in a free state, than making the military power, when such a one is necessary to be kept on foot, a body too distinct from the people. Like ours, it should wholly be composed of natural subjects; it ought only to be enlisted for a short and limited time; the soldiers also should live intermixed with the people; no separate camp, no barracks, no inland fortresses should be allowed. And perhaps it might be still better, if, by dismissing a stated number, and enlisting others at every renewal of their term, a circulation could be kept up between the army and the people, and the citizen and the soldier be more intimately connected together[11].

[x] Sp. L. 11, 6.

(10) The number authorized by the present Mutiny Act, 6 & 7 Vict. c. 3, is 100,846.

(11) "A soldier," said Lord Mansfield, (in *Burdett* v. *Abbott*, 4 Taunt. 449), "is gifted with all the rights of other citizens and is bound to all the duties of other citizens, and he is as much bound to prevent a breach of the peace as any other citizen.—If it is necessary for the purpose of preventing mischief, or for the execution of the law, it is not only the right of soldiers but it is their duty to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed." See also 2 B. & P. 264.

To keep this body of troops in order, an annual act of parliament[12] likewise passes, "to punish mutiny and desertion, and for the better payment of the army and their quarters[13]." The annual Mutiny Act.

This regulates the manner in which they are to be dispersed among the several innkeepers and victuallers throughout the kingdom; and establishes a law martial for their government. By this, among other things, it is enacted, that if any officer [416] or soldier shall excite or join any mutiny, or, knowing of it, shall not give notice to the commanding officer; or shall desert or list in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands: such offender shall suffer such punishment as a court martial shall inflict, though it extend to death itself[14].

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(12) The first annual Mutiny Act was passed (1609), in consequence of a mutiny which broke out in a body of English and Scotch troops upon their being ordered to Holland to replace certain Dutch troops which William 3 had brought over with him to England. The military code which had been drawn up and issued by James 2, in 1686, by virtue of his royal prerogative as generalissimo of the forces, under the title of "The English Military Discipline," contained many excellent articles, which were embodied in the Mutiny Act; as for example, that the members of courts martial shall give their opinions according to seniority, but beginning with the youngest and ending with the president, the object of which is to guard the judgments of the junior from being biassed by those of the senior officers.

(13) These two provisions, that the army shall remain at the entire disposal and command of the sovereign for one year, and yet its pay and continuance beyond that period shall be dependent on the will of the parliament, seem to provide for the due exercise of this momentous trust, so as neither to endanger the national liberty nor impoverish the public purse. (Vide supra, p. 335, n. 58). To use the quaint language of Whitelocke, "the king retains the power of the sword, but the parliament retains that of the purse, so that they must *both* agree to draw the sword, or else leave it in the scabbard, which is the best place for it."

(14). A clause is also usually inserted in the Mutiny Act, that all offences against former mutiny acts shall be cognizable by courts martial, if the offender be prosecuted within three years from the time of committing the offence.

Besides the Mutiny Act, there are several permanent acts affecting soldiers; thus 8 Geo. 2, c. 30, requires that soldiers shall be removed from places where elections of members of parliament are about to take place; on which act, see supra, p. 179, n. 62. By 37 Geo. 3, c. 70, revived and made perpetual by 57 Geo. 3, c. 7, the offence of attempting to seduce persons serving in the royal forces by sea or land from their duty or allegiance, or to incite them to mutiny or disobedience, was

However expedient the most strict regulations may be in time of actual war, yet in times of profound peace a little relaxation of military rigour would not, one should hope, be productive of much inconvenience. And, upon this principle, though by our standing laws[y] (still remaining in force, though not attended to) desertion in time of war is made felony without benefit of clergy, and the offence is triable by a jury and before justices at the common law: yet, by our militia laws before mentioned, a much lighter punishment is inflicted for desertion in time of peace. So, by the Roman law, also, desertion in time of war was punished with death, but more mildly in time of tranquillity[z]. But our Mutiny Act makes no such distinction: for any of the faults above mentioned are equally at all times punishable with death itself, if a court martial shall think proper. This discretionary power of the court martial is indeed to be guided by the directions of the crown; which, with regard to military offences, has almost an absolute legislative power[a]. "His majesty," says the act, "may form articles of war and constitute courts martial, with power to try any crime by such articles, and inflict penalties by sentence or judgment of the same." A vast and most important trust! an unlimited power to create crimes, and annex to them any punishments, not extending to life or limb. These are indeed forbidden to be inflicted, except for crimes declared to be so punishable by this act; which crimes we have just enumerated, and, among which, we may observe that any disobedience to lawful commands is one. Perhaps in some future revision of this act, which is in many respects hastily penned, it may be thought worthy the wisdom of parliament to ascertain the limits of military subjection, and to enact express articles of war for the government of the army, as is done for the government of the navy; especially as, by our present constitution, the nobility and gentry of the kingdom, who

The power of the crown.

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[y] Stat. 18 Hen. VI. c. 19; 2 & 3 Edw. VI. c. 2.

[z] Ff. 49, 16, 28.

[a] A like power over the marines is given to the lords of the Admiralty by another annual act, viz. "for the regulation of his Majesty's marine forces while on shore."

made a capital felony; but these statutes were repealed by 7 Wm. 4 and 1 Vict. c. 91, and the punishment for the above offences reduced to transportation for life or for fifteen years or imprisonment for three years.

serve their country as militia officers, are annually subjected to the same arbitrary rule, during their time of exercise[15].

On military law.

One of the greatest advantages of our English law is, that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious: nothing is left to arbitrary discretion; the king by his judges dispenses what the law has previously ordained; but is not himself the legislator. How much therefore it is to be regretted that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen! for sir Edward Coke will inform us[b], that it is one of the genuine marks of servitude, to have the law, which is our rule of action, either concealed or precarious; "*misera est servitus ubi jus est vagum aut incognitum.*" Nor is this state of servitude quite consistent with the maxims of sound policy observed by other free nations. For the greater the general liberty is which any state enjoys, the more cautious has it usually been in introducing slavery in any particular order or profession. These men, as baron Montesquieu observes[c], seeing the liberty which others possess, and which they themselves are excluded from, are apt (like eunuchs in the eastern seraglios) to live in a state of perpetual envy and hatred towards the rest of the community; and indulge a malignant pleasure in contributing to destroy those privileges to which they can never be admitted. Hence have many free states, by departing from this rule, been endangered by the revolt of their slaves: while in

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[b] 4 Inst. 332. [c] Sp. L. 15, 12.

(15) Where courts martial exceed their jurisdiction the court of Queen's Bench will interfere by prohibition precisely as in restraining other courts having particular jurisdictions; see H. Bl. 59. As to "the power of the crown under the Mutiny Act to create crimes," see Lord Loughborough's remarks already quoted, supra, p. 413, note 7.

The writ of habeas corpus will be refused where there has been no excess of jurisdiction on the part of the court martial; see 1 East, 307, but see further 2 M. & S. 428. Nor will a prohibition issue to a court martial after its sentence has been ratified by the crown and carried into execution; see 5 B. & Ad. 681.

It may be observed, that an action of libel will not lie against the president of a court martial, who has pronounced censure on the conduct of an officer coming before him in, and connected with, the case under the consideration of the court; see 6 Esp. 63. Actions of trespass also, when brought against officers exceeding the limits of their authority, must be commenced within six months after the act complained of; see 4 Taunt. 67; S. C. in error, 4 M. & S. 400.

absolute and despotic governments, where no real liberty exists, and consequently no invidious comparisons can be formed, such incidents are extremely rare. Two precautions are therefore advised to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen. Much less ought the soldiery to be an exception to the people in general, and the only state of servitude in the nation[16].

But as soldiers, by this annual act, are thus put in a worse condition than any other subjects, so, by the humanity of our standing laws, they are in some cases put in a much better. By statute 43 Eliz. 3, a weekly allowance is to be raised in every county for the relief of soldiers that are sick, hurt, and maimed: not forgetting the royal hospital at Chelsea, for such as are worn out in their duty. Officers and soldiers, that have been in the king's service, are, by several statutes, enacted at the close of several wars, at liberty to use any trade or occupation they are fit for, in any town in the kingdom (except the two universities), notwithstanding any statute, custom, or charter to the contrary[17]. And soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses, which the law requires in

(16) The servitude to which the soldier is reduced in this country has most, if not all, of the alleviations which are compatible with good discipline and due subordination; and although the binding obligations of the military law be renewed every year, yet its regulations are neither so numerous nor so complex, as to render observance of them difficult; while the annual revision of them, though originally intended for the protection of the subject against the crown, serves also as a guarantee against injustice and caprice towards the soldier. It should also be recollected that the articles of war, which embody the chief provisions of the Mutiny Act, are read at the head of every corps once in every three months. McArthur, Kennedy, and other writers on courts martial and military law have justly censured Blackstone's remarks on military law; which are the more reprehensible, because, even at the time when Blackstone wrote, the military code was characterized by a precision in its language, both as to crimes and punishments, utterly unknown to every other branch of our penal laws.

(17) See 3 Geo. 3, c. 8; 24 Geo. 3, st. 2, c. 6; 42 Geo. 3, c. 69, and 56 Geo. 3, c. 67.

other cases[c18]. Our law does not indeed extend this privilege so far as the civil law; which carried it to an extreme that borders upon the ridiculous. For if a soldier, in the article of death, wrote any thing in bloody letters on his shield, or in the dust of the field with the sword, it was a very good military testament[d]. And thus much for the military state, as acknowledged by the laws of England[19].

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Of the maritime state.

The *maritime* state is nearly related to the former, though much more agreeable to the principles of our free constitution. The royal navy of England hath ever been its greatest defence and ornament; it is its ancient and natural strength; the floating bulwark of the island; an army, from which, however strong and powerful, no danger can ever be apprehended to liberty: and accordingly it has been assiduously cultivated, even from the earliest ages. To so much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the laws of Oleron, and are received by all nations in Europe as the ground and substruction of all their marine constitutions, was confessedly compiled by our king Richard the First, at the isle of Oleron,

[c] Stat. 29 Car. II. c. 3; 5 W. III. c. 21, § 6.

[d] *Si milites quid in clypeo literis sanguine suo rutilantibus adnotaverint, aut in pulvere inscripserint gladio suo ipso tempore quo, in prælio, vitæ sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet.* Cod. 6, 21, 15.

(18) By 55 Geo. 3, c. 184, sched. part iii., the probate, &c. of wills and letters of administration of the effects of soldiers or seamen dying in service are exempt from stamp duties. The testamentary dispositions of property made by soldiers being in actual military service, and by mariners and seamen being at sea are also excepted from the recent Wills Act, 7 Wm. 4 and 1 Vict. c. 26.

(19) It may also be observed, that it is now fully established that assignments either of the half or whole pay of a military officer or of seaman's wages are void at law; see 3 T. R. 681; Peake, 175; 4 T. R. 248, and 1 H. Bl. 627; and in equity also; see Dyer, 1 b.; 2 Anstr. 533, 541; 3 B. & P. 528, and 1 Ball & Beat. 387. A portion of the pay or pension of officers, &c. being insolvent debtors, may be obtained by their assignees under 1 & 2 Vict. c. 110, s. 56; see also 1 N. & M. 579; 4 B. & Ad. 690; assignments of half-pay, pensions, prize-money, &c. payable in respect of the services of any petty officer or seaman, non-commissioned officers of marines or marine are null and void under 11 Geo 4, c. 20, s. 47; as also are assignments of pensions of retired soldiers; see 46 Geo. 3, c. 69, s. 7. But by 2 & 3 Vict. c. 51, repealing 59 Geo. 3, c. 12, in part, and 6 Geo. 4, c. 27, wholly, Chelsea and Greenwich pensioners and other persons receiving parochial relief, may assign their future payments to the guardians.

on the coast of France, then part of the possessions of the crown of England[e]. And yet, so vastly inferior were our ancestors in this point to the present age, that even in the maritime reign of queen Elizabeth, sir Edward Coke[f] thinks it matter of boast, that the royal navy of England then consisted of *three-and-thirty* ships. The present condition of our marine is in great measure owing to the salutary provisions of the statutes called the Navigation Acts[20]; whereby the constant increase of English shipping and seamen was not only encouraged, but rendered unavoidably necessary. By the statute 5 Ric. II. c. 3, in order to augment the navy of England, then greatly diminished, it was ordained, that none of the king's liege people should ship any merchandise out of or into the realm but only in ships of the king's ligeance, on pain of forfeiture. In the next year, by statute 6 Ric. II. c. 8, this wise provision was enervated, by only obliging the merchants to give English ships (if able and sufficient) the preference. But the most beneficial statute for the trade and commerce of these kingdoms is that Navigation Act, the rudiments of which were first framed in 1650[g], with a narrow partial view: being

The navigation acts.

[e] 4 Inst. 144; Coutumes de la mer, 2.

[f] 4 Inst. 50.

[g] Scobell, 132.

(20) These acts, however, have been, by the more enlightened policy of modern times, in a great measure repealed; see 4 Geo. 4, cc. 41, 42—45, and 6 Geo. 4, cc. 105, 109, 110. For a concise and excellent sketch of the history and principles of our navigation laws, see McCulloch's Dict. of Com. art. Navigation Laws. The statutes on the subject are 3 & 4 Wm. 4, cc. 50, 54, 55, & 59; 4 & 5 Wm. 4, cc. 13, 89; 5 & 6 Wm. 4, cc. 19, 66, and 3 & 4 Vict. c. 95. The object of these statutes, is first, to place our intercourse with all foreign nations at amity with us on the same footing; secondly, to permit the importation of enumerated goods in ships of the country from which they are imported, as well as in British ships or in ships of the country of which such goods are the produce; and thirdly, to allow British ships to take on board any goods, the importation of which is not prohibited, on meeting with them in any Asiatic, African, or American port. To these important changes must be added the general adoption of what is called "the reciprocity system," the principle of which is, that the ships of any specified foreign ports shall be admitted into our ports on their paying the same charges as our own ships, on condition that British ships be admitted into such foreign ports on a similar footing; and that equal duties shall be laid upon all articles the produce of the one country imported into the other, whether such importation be effected in the ships of the one or of the other. Commercial treaties based on this sound and liberal principle have been entered into with the American and most of the European states.

intended to mortify our own sugar islands, which were disaffected to the parliament, and still held out for Charles II., by stopping the gainful trade which they then carried on with [420] the Dutch[h]; and at the same time to clip the wings of those our opulent and aspiring neighbours. This prohibited all ships of foreign nations from trading with any English plantations without license from the council of state. In 1651[i], the prohibition was extended also to the mother country: and no goods were suffered to be imported into England, or any of its dependencies, in any other than English bottoms; or in the ships of that European nation of which the merchandise imported was the genuine growth or manufacture. At the Restoration the former provisions were continued by statute 12 Car. II. c. 18, with this very material improvement, that the master and three-fourths of the mariners shall also be English subjects.

Many laws have been made for the supply of the royal navy with seamen; for their regulation when on board; and to confer privileges and rewards on them during and after their service.

The modes of supplying the navy.

1. First, for their supply. The power of impressing seafaring men for the sea service by the king's commission has been a matter of some dispute, and submitted to with great reluctance; though it hath very clearly and learnedly been shewn by sir Michael Foster[j], that the practice of impressing and granting powers to the admiralty for that purpose is of very ancient date, and hath been uniformly continued by a regular series of precedents to the present time: whence he concludes it to be part of the common law[k]. The difficulty arises from hence, that no statute has expressly declared this power to be in the crown, though many of them very strongly imply it. The statute 2 Ric. II. c. 4, speaks of mariners being arrested and retained for the king's service, as of a thing well known and practised without dispute: and provides a remedy against their running away. By a later statute[l], if any waterman, who uses the river Thames, shall hide himself during [419*] the execution of any commission of pressing for the king's service, he is liable to heavy penalties. By another[m], no

[h] Mod. Un. Hist. xli. 289.
[i] Scobell, 176.
[j] Rep. 154.
[k] See also Comb. 245; Barr. 334.
[l] Stat. 2 & 3 Ph. & M. c. 16.
[m] Stat. 5 Eliz. c. 5.

fisherman shall be taken by the queen's commission to serve as a mariner; but the commission shall be first brought to two justices of the peace, inhabiting near the sea-coast where the mariners are to be taken, to the intent that the justices may choose out and return such a number of able-bodied men, as in the commission are contained to serve her majesty. And, by others[n], especial protections are allowed to seamen in particular circumstances to prevent them from being impressed. And ferrymen are also said to be privileged from being impressed, at common law[o]. All which do most evidently imply a power of impressing to reside somewhere; and, if any where, it must, from the spirit of our constitution, as well as from the frequent mention of the king's commission, reside in the crown alone[21].

But, beside this method of impressing (which is only defensible from public necessity, to which all private considerations must give way), there are other ways that tend to the increase of seamen, and manning the royal navy[22]. Parishes may bind out poor boys apprentices to masters of merchantmen, who shall be protected from impressing for the first three years; and if they are impressed afterwards, the masters shall be allowed their wages[p 23]: great advantages in point of wages are given to volunteer seamen, in order to induce them to enter into his majesty's service[q]; and every foreign seaman who during a war shall serve two years in any man of war, merchantman, or privateer, is naturalized *ipso facto*[r]. About

[n] See stat. 7 & 8 Wm. III. c. 21; 2 Ann. c. 6; 4 & 5 Ann. c. 19; 13 Geo. II. c. 17; 2 Geo. III. c. 15; 11 Geo. III. c. 38; 19 Geo. III. c. 75, &c.

[o] Sav. 14.

[p] Stat. 2 & 3 Ann. c. 6.

[q] Stat. 31 Geo. II. c. 10.

[r] Stat. 13 Geo. II. c. 3.

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(21) The legality of impressment is now fully established; see Cowp. 512; 5 T. R. 276; and the custom seems also to have been recently recognised in 5 & 6 Wm. 4, c. 24, which enacts, that no person shall be detained on board ship in the king's service for more than five years without his own consent, except in cases of emergency.

(22) As to the voluntary enlistment of seamen to serve in her Majesty's navy, see 5 & 6 Wm. 4, c. 24; and as to the pay of the navy, see 11 Geo. 4 and 1 Wm. 4, c. 20; 4 & 5 Wm. 4, c. 25, and 5 Vict. c. 3.

(23) By 5 & 6 Wm. 4, c. 19, ss. 26—39, further provisions are made for the apprenticing of boys, whose parents are chargeable to the parish, to the master or owner of any ship registered in any port of the United Kingdom.

the middle of king William's reign a scheme was set on foot[s] for a register of seamen to the number of thirty thousand, for a constant and regular supply of the king's fleet; with great privileges to the registered men, and, on the other hand, heavy penalties in case of their non-appearance when called for: but this registry, being judged to be ineffectual as well as oppressive, was abolished by statute 9 Anne, c. 21[24]. [420*]

The articles of the navy.

2. The method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain express rules, articles, and orders, first enacted by the authority of parliament soon after the Restoration[t]; but since new-modelled and altered, after the peace of Aix la Chapelle[u], to remedy some defects which were of fatal consequence in conducting the preceding war. In these articles of the navy almost every possible offence is set down, and the punishment thereof annexed; in which respect the seamen have much the advantage over their brethren in the land-service; whose articles of war are not enacted by parliament, but framed from time to time at the pleasure of the crown. Yet from whence this distinction arose, and why the executive power, which is limited so properly with regard to the navy, should be so extensive with regard to the army, it is hard to assign a reason: unless it proceeded from the perpetual establishment of the navy, which rendered a permanent law for their regulation expedient; and the temporary duration of the army, which subsisted only from year to year, and might therefore with less danger be subjected to discretionary government. But whatever was apprehended at the first formation of the mutiny act, the regular renewal of our standing force at the entrance of every year has made this distinction idle. For, if from experience past we may judge of future events, the army is now lastingly ingrafted into the British constitution; with this singularly fortunate circumstance, that any branch of the legislature may annually put an end to its legal existence, by refusing to concur in its continuance.

[s] Stat. 7 & 8 Wm. III. c. 21.
[t] Stat. 13 Car. II. st. 1, c. 9.
[u] Stat. 22 Geo. II. c. 33, amended by 19 Geo. III. c. 17.

(24) But has since been revived by 5 & 6 Wm. 4, c. 19, which makes various provisions for forming and maintaining a register of all seamen engaged in the merchant service.

Privileges of sailors.

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3. With regard to the privileges conferred on sailors, they are pretty much the same with those conferred on soldiers; with regard to relief when maimed, or wounded, or superannuated, either by county rates, or the royal hospital at Greenwich; with regard also to the exercise of trades, and the power of making nuncupative testaments: and farther[w], no seaman on board his majesty's ships can be arrested for any debt, unless the same be sworn to amount to at least twenty pounds[25]; though, by the annual Mutiny Acts, a soldier may be arrested for a debt which extends to half that value, but not to a less amount.

[w] Stat. 31 Geo. II. c. 10.

(25) In the Mutiny Act of 1838, (1 & 2 Vict. c. 17, s. 3), it was provided, that no soldier should be taken out of her Majesty's service by any process or execution for any debt less than 30*l.* over and above all costs of suit; a section which is re-enacted in the present Mutiny Act, 6 & 7 Vict. c. 3. Soldiers and sailors like all other persons are now protected from arrest upon mesne process for any amount; see 1 & 2 Vict. c. 110.

CHAPTER XIV.

OF MASTER AND SERVANT.

HAVING thus commented on the rights and duties of persons as standing in the *public* relations of magistrates and people, the method I have marked out now leads me to consider their rights and duties in *private* œconomical relations.

Rights and duties as to relations in private life.

The three great relations in private life are, 1, That of *master and servant:* which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him. 2. That of *husband and wife;* which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3. That of *parent and child:* which is consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated. But, since the parents, on whom this care is primarily incumbent, may be snatched away by death before they have completed their duty, the law has therefore provided a fourth relation. 4. That of *guardian and ward;* which is a kind of artificial parentage, in order to supply the deficiency, whenever it happens, of the natural. Of all these relations in their order.

Master and servant.

In discussing the relation of *master and servant,* I shall first consider the several sorts of servants, and how this relation is created and destroyed; secondly, the effect of this relation with regard to the parties themselves; and, lastly, its effects with regard to other persons.

Slavery.

I. As to the several sorts of servants; I have formerly observed [a] that pure and proper slavery does not, nay cannot, subsist in England; such, I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist any where. The three origins of the right of slavery, assigned by Justinian [b], are all of them built upon false foundations [c]. As, first, slavery is held to arise "*jure gentium*," from a state of captivity in war; whence slaves are called *mancipia, quasi manu capti.* The conqueror, say the civilians, had a right to the life of his captive, and, having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that by the law of nature or nations a man may kill his enemy; he has only a right to kill him in particular cases; in cases of absolute necessity, for self-defence; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War is itself justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners, but merely to disable them from doing harm to us, by confining their persons; much less can it give a right to kill, torture, abuse, plunder, or even to enslave an enemy, when the war is over. Since, therefore, the right of *making* slaves by captivity depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise. But, secondly, it is said that slavery may begin "*jure civili*;" when one man sells himself to another. This, if only meant of contracts to serve or work
[424] for another, is very just: but when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is also impossible. Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life and liberty, both of which (in absolute slavery) are held to be in the master's disposal? His property also, the very price he seems to receive, devolves *ipso facto* to his master the instant he becomes his slave. In this case, therefore, the buyer gives

[a] Page 127.

[b] *Servi aut fiunt aut nascuntur: fiunt jure gentium, aut jure civili; nascuntur ex ancillis nostris.* Inst. 1, 3, 4.

[c] Montesq. Sp. L. xv. 2.

nothing, and the seller receives nothing; of what validity then can a sale be, which destroys the very principles upon which all sales are founded? Lastly, we are told, that besides these two ways by which slaves "*fiunt*," or are acquired, they may also be hereditary; "*servi nascuntur*;" the children of acquired slaves are *jure naturæ*, by a negative kind of birth-right, slaves also. But this, being built on the two former rights, must fall together with them. If neither captivity, nor the sale of one's self, can by the law of nature and reason reduce the parent to slavery, much less can they reduce the offspring.

Slavery cannot exist within the limits of British law.

Upon these principles the law of England abhors, and will not endure the existence of, slavery within this nation; so that when an attempt was made to introduce it by statute 1 Edw. VI. c. 3, which ordained that all idle vagabonds should be made slaves, and fed upon bread, water, or small drink, and refuse meat; should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining or otherwise, to perform the work assigned them, were it never so vile; the spirit of the nation could not brook this condition even in the most abandoned rogues; and therefore this statute was repealed in two years afterwards [d]. And now it is laid down [e], that a slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person and his property. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before: for this is no more than the same state of subjection for life, which every apprentice [425] submits to for the space of seven years, or sometimes for a longer term. Hence too it follows, that the infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The law of England acts upon general and extensive principles; it gives liberty, rightly understood, that is, protection to a Jew, a Turk, or a Heathen, as well as to those who profess the true religion of Christ; and it will not dissolve a civil obligation between master and servant, on account of the alteration of

[d] Stat. 3 & 4 Edw. VI. c. 16.

[e] Salk. 666.

faith in either of the parties, but the slave is entitled to the same protection in England before, as after, baptism; and whatever service the heathen negro owed of right to his American master, by general not by local law, the same (whatever it be) is he bound to render when brought to England and made a christian [1].

Menial servants.

1. The first sort of servants, therefore, acknowledged by the laws of England, are *menial servants;* so called from being *intra mœnia,* or domestics [2]. The contract between them and their masters arises upon the hiring. If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year [f]; upon a principle of natural equity that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as when there is work to be done, as when there is not [g]: but the contract may be made for any larger or smaller term [3].

[f] Co. Litt. 42. [g] F. N. B. 168.

(1) This doctrine which the learned commentater has already laid down (supra, p. 127), that the master's right to the service of the negro may "possibly" still continue after the state of slavery has been cast off, is here also expressed in very guarded terms; viz. to extend only to the service "to which the master may have lawfully acquired a right," or which the heathen negro "owed of right to his master by general law." With regard to the latter, Blackstone has already shewn that the existence of such a right is repugnant to reason and natural law; and with regard to the former, Mr. Christian well observes that a contract of service made by a person in a state of slavery must be absolutely null and void. But the statute 3 & 4 Wm. 4, c. 73, amended by 5 & 6 Wm. 4, c. 45; 6 & 7 Wm. 4, cc. 5, 16, 82, and 1 & 2 Vict. cc. 3, 19, having abolished slavery throughout the British colonies, a negro can owe no other service to his master, than would be due, under similar circumstances, from any other person.

(2) Residence *intra mœnia, i. e.* within the curtilage or domain of the master, constitutes gardeners, gatekeepers and others, domestic or menial servants; see 2 Cr., M. & R. 54; Moore Rep. 8; 9 Litt. 139; 16 E. 33. But residence *intra mœnia,* is not sufficient of itself to render every servant a domestic; thus the clerk to an army clothier, though resident on the premises of his employer, is no domestic; see 4 Bing. 309; S. C. 12 B. Moore, 552, and 2 Car. & Pay. 607; nor a warehouseman; see 5 B. & Ad. 90; S. C. 3 N. & M. 177.

(3) Where no period to the service is fixed and no agreement made as to notice, the law is, that a general hiring is a yearly hiring, and the servant, if dismissed without reason may recover a year's wages; see 4 Bing. 309; S. C. 12 Moore, 552; 5 B. & Ad. 904; S. C. 3 N. & M. 177; or a proportionate part by an action *quantum meruit;* see 1 A. & E. 685; S. C. 3 N. & M. 545; 1 M. & W. 506. But it seems that an action of *indebitatus assumpsit* for work and labour, such action being commenced before the end

Servants in husbandry and artificers.

All single men between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service in husbandry or certain specific trades, for the promotion of honest industry: and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning, unless upon reasonable cause to be allowed by a justice of the peace[h4]: but they may part by consent, or make a special bargain[5]. [426]

[h] Stat. 5 Eliz. c. 4.

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of the term of service will not lie; see 7 A. & E. 544; S. C. 2 N. & P. 139. But in the case of menial or domestic servants the custom and the law is, that the contract may be determined at the will of either party upon a month's notice, or upon payment of a month's wages; see 3 Esp. 335; 4 Bing. 309; 5 Bing. 135; 5 B. & Ad. 904; 3 Car. & Pay. 349; 2 C., M. & R. 59.

(4) This power is confined to servants in out-door work or country labour and the trades in being at the time of and mentioned in the several statutes; see 6 T. R. 583. The 20 Geo. 2, c. 19, gives jurisdiction to one or more justices of the peace to determine differences between masters or mistresses and servants in husbandry, who shall be hired for one year or longer (extended by 31 Geo. 3, c. 11, s. 3, to all servants in husbandry though hired for less than a year), or between masters and mistresses and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers employed for any certain time or in any other manner; to make order for the payment of wages, &c. not exceeding 10*l.*, with regard to any servant, or 5*l.*, with regard to any artificer, &c., potter or labourer. And by 4 Geo. 4, c. 34, such servants leaving their work unfinished or otherwise failing to perform their contract of service, may be committed to the house of correction to hard labour for three months; and on the other hand, orders for the payment of their wages may be made upon the steward, bailiff, or other agent of their master. These statutes are only applicable to persons, contracts, &c., strictly of the same description as those specially mentioned therein, upon which, see 8 East, 113; and of course, justices of the peace who exceed their jurisdiction, as against either master or servant, render themselves liable to actions; see 7 B. & C. 536; 9 B. & C. 603, 628.

It may also be observed, that the statute 5 Geo. 4, c. 18, does not authorise justices to commit a master in default of sufficient goods and chattels, to answer a distress for non-payment of wages; see 3 A. & E. 524.

(5) A servant may also be dismissed without notice for reasonable cause, as great moral misconduct (4 C. & P. 208); betraying the secrets of his master (2 C. & P. 609); wilful and obstinate disobedience (2 Stark. 256); or habitual neglect of duty (4 C. & P. 518); and of course without being entitled to any wages except those then due (3 Esp. 235; 5 B. & Ad. 789; S. C. 2 N. & M. 829; 3 Ad. & El. 171; 4 Bing. N. C. 638). If a servant leave his service without notice or just cause for so doing, he is liable to an action (2 Car. & Pay. 510).

Apprentices

2. Another species of servants are called *apprentices* (from *apprendre*, to learn), and are usually bound for a term of years, by deed indented, or indentures, to serve their masters, and be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art and mystery; and sometimes very large sums are given with them, as a premium for such their instruction: but it may be done to husbandmen, nay to gentlemen, and others[6]. And[i] children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-one years of age, to such persons as are thought fitting; who are also compellable to take them; and it is held, that gentlemen of fortune, and clergymen, are equally liable with others to such compulsion[k7]; for which purposes our statutes have made the indentures obligatory, even though such parish apprentice be a

[i] Stat. 5 Eliz. c. 4; 43 Eliz. c. 2; 1 Jac. I. c. 25; 7 Jac. I. c. 3; 8 & 9 W. & M. c. 30; 2 & 3 Ann. c. 6; 4 Ann. c. 19; 17 Geo. II. c. 5; 18 Geo. III. c. 47.

[k] Salk. 67, 491.

With regard to "giving characters" to servants, it has been held that although the servant "has no right to a character" (3 Esp. 201); yet, if the master assume to give a character of a servant, he must give the true one; for he who gives a false character, charging the servant with faults without just cause, &c., with a malicious design to injure the servant, is liable to an action; (3 B. & P. 587; 5 Esp. 13; 4 B. & C. 247); express proof of malice is, however, necessary to support such action. (4 B. & Ad. 700). But on the other hand, masters owe a duty to those persons about to engage a late servant, which duty compels them to make full and true, if they make any, answers to all inquiries. (8 B. & C. 578; 9 B. & C. 403). By 32 Geo. 3, c. 56, persons personating a master or mistress and giving a false character to a servant, or falsely asserting in writing that a servant has been hired for a period of time or in a station, or was discharged at any other time, or had not been hired in any previous service; or any person offering himself as a servant, pretending to have served where he has not served, or with a false certificate, or who shall alter any certificate; or having been before in service shall pretend not to have been in such service, &c. shall be liable to a penalty of 20*l*.

(6) Indentures of apprenticeship must be executed by the apprentice, otherwise they are not binding; for a father has, at common law, no authority to bind his infant son apprentice, without his own assent; see 3 B. & Ald. 584; and the Legislature has dispensed with this assent only in the case of parish apprentices; whose indentures, however, must receive the approbation of two justices of the peace.

(7) The parish officers, with the assent of two justices, may bind a parish apprentice to a person who resides out of their parish, but occupies an estate in the parish (3 T. R. 107); or to partners who reside out of the parish, if some of the partners be resident upon the partnership property within the parish. (7 T. R. 33).

minor[l]. Apprentices to trades may be discharged on reasonable cause, either at the request of themselves or masters, at the quarter sessions, or by one justice, with appeal to the sessions[m]; who may, by the equity of the statute, if they think it reasonable, direct restitution of a rateable share of the money given with the apprentice[n]: and parish apprentices may be discharged in the same manner by two justices[o]. But if an apprentice, with whom less than ten pounds hath been given, runs away from his master, he is compellable to serve out his time of absence, or make satisfaction for the same, at any time within seven years after the expiration of his original contract[p 8].

3. A third species of servants are *labourers*, who are only hired by the day or the week, and do not live *intra mœnia*, as part of the family; concerning whom the statutes before cited[q] have made many very good regulations: 1. Directing that all persons who have no visible effects may be compelled to work: 2. Defining how long they must continue at work in summer and in winter: 3. Punishing such as leave or desert their work: 4. Empowering the justices at sessions, or the sheriff of the county, to settle their wages[9]: and, 5. In- Labourers. [427]

[l] Stat. 5 Eliz. c. 4; 43 Eliz. c. 2; Cro. Car. 179.
[m] Stat. 5 Eliz. c. 4.
[n] Salk. 68.
[o] Stat. 20 Geo. II. c. 19.
[p] Stat. 6 Geo. III. c. 26.
[q] Stat. 5 Eliz. c. 4; 6 Geo. III. c. 25.

(8) The binding, assignment, registry, and cancelling of the indentures of, and the jurisdiction of the magistrates over parish and other apprentices, have been provided for by various statutes, besides those cited by Blackstone, the most important of which are 32 Geo. 3, c. 57, 65; 33 Geo. 3, c. 55; 42 Geo. 3, cc. 46, 73; 50 Geo. 3, c. 80; 51 Geo. 3, c. 80; 54 Geo. 3, cc. 96, 107; 56 Geo. 3, c. 139; 59 Geo. 3, c. 66; 1 & 2 Geo. 4, c. 42; 4 Geo. 4, cc. 29, 34; 6 Geo. 4, c. 63; 3 & 4 Wm. 4, c. 63, and 5 & 6 Vict. c. 7; see also Burn's Justice, tit. Apprentice. Rules, orders, and regulations on the subject may also be issued by the poor-law commissioners under sects. 15, 71, of the Poor-Law Amendment Act. (4 & 5 Wm. 4, c. 76), vide supra, p. 361, n. 28.

As to parish apprentices to the sea service, see ss. 26, 28, 36, 39, of the Merchant Seamen's Act, (6 Wm. 4, c. 19).

(9) By 53 Geo. 3, c. 40, so much of 5 Eliz. c. 4, and other statutes, as empowered justices of the peace to rate wages or fix prices of work for artificers, labourers, and craftsmen, was repealed; and of course, the justices' power of inflicting penalties in such cases, mentioned in the next sentence, ceased. There were also several old statutes directed against conspiracies and combinations of workmen for raising wages; see 33 Edw. 1, st. 2;

flicting penalties on such as either give, or exact, more wages than are so settled.

Stewards, factors, bailiffs, &c.

4. There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards*, *factors*, and *bailiffs*: whom however the law considers as servants [10], *pro tempore*, with regard to such of their acts as affect their master's or employer's property [11]. Which leads me to consider,

II. The incidents of service.

II. The manner in which this relation, of service, affects either the master or servant. And, first, by hiring and service for a year [12], or apprenticeship under indentures [13], a person gains a settlement in that parish wherein he last served forty days [r]. In the next place, persons serving seven years as apprentices to any trade, have an exclusive right to exercise that trade in any part of England [s 14]. This law,

As to apprentices.

[r] See page 364.

[s] Stat. 5 Eliz. c. 4, § 31.

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3 Hen. 6, c. 1, to 39 & 40 Geo. 3, c. 106, and 5 Geo. 4, c. 95; but these were for the most part repealed and new provisions enacted in lieu thereof by 6 Geo. 4, c. 129. By 1 & 2 Wm. 4, c. 37, various excellent provisions have been made with the intention of putting an end to the "truck system" of payment.

(10) The law considers stewards, factors, and bailiffs as being the agents rather than the servants of their masters or employers, for upon the relation of principal and agent are founded all their mutual rights, duties, and liabilities. The statute law relating to factors and brokers has merely related to contracts between them and third parties. These acts are 4 Geo. 4, c. 83; 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39.

(11) Besides the four sorts of servants enumerated by Blackstone, may be mentioned, first, the merchant seamen, the law relating to whose contracts, hiring, service, and remuneration has been amended and consolidated by 6 Wm. 4, c. 19; and secondly, children and women working in mills and factories or in mines and collieries, the condition of the former of whom the Legislature has sought to ameliorate by 42 Geo. 3, c. 73, 3 & 4 Wm. 4, c. 103, and 4 & 5 Wm. 4, c. 1; and that of the latter by 5 & 6 Vict. c. 99, which prohibits the employment of women and girls in mines and collieries, and regulates the employment of boys therein; besides making other provisions for the safety and protection of all persons working therein.

(12) A settlement cannot now be gained by hiring and service; see supra, p. 364, n. 35.

(13) A settlement is still gained by apprenticeship, except it be to the sea service; see supra, p. 364, n. 36.

(14) The section of the statute of Elizabeth, on which this was founded, was repealed by 54 Geo. 3, c. 96; and by sect. 14 of the Municipal Corporation Reform Act, 5 & 6 Wm. 4, c. 76, exclusive rights of trading in boroughs,

with regard to the exclusive part of it, has by turns been looked upon as a hard law, or as a beneficial one, according to the prevailing humour of the times: which has occasioned a great variety of resolutions in the courts of law concerning it; and attempts have been frequently made for its repeal, though hitherto without success. At common law every man might use what trade he pleased; but this statute restrains that liberty to such as have served as apprentices: the adversaries to which provision say, that all restrictions (which tend to introduce monopolies) are pernicious to trade; the advocates for it allege, that unskilfulness in trades is equally detrimental to the public, as monopolies. This reason indeed only extends to such trades, in the exercise whereof skill is [428] required: but another of their arguments goes much farther; *viz.* that apprenticeships are useful to the commonwealth, by employing of youth, and learning them to be early industrious; but that no one would be induced to undergo a seven years' servitude, if others, though equally skilful, were allowed the same advantages without having undergone the same discipline: and in this there seems to be much reason. However, the resolutions of the courts have in general rather confined than extended the restriction. No trades are held to be within the statute, but such as were in being at the making of it[t]: for trading in a country village, apprenticeships are not requisite[u]; and following the trade seven years, without any effectual prosecution (either as a master or a servant), is sufficient without an actual apprenticeship[w].

A master may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation[x]: though if the master or master's wife beats any other servant of full age, it is good cause of departure[y 15]. But if any ser-

[t] Lord Raym. 514.

[u] 1 Ventr. 51; 2 Keb. 583.

[w] Lord Raym. 1179; Wallen *qui tam v.* Holton, Tr. 33 Geo. II. (by all the judges.) [1 W. Bl. 233].

[x] 1 Hawk. P. C. 130; Lamb. Eiren. 130; Cro. Car. 179; 2 Show. 289.

[y] F. N. B. 168; Bro. Abr. tit. Labourers, 51, Trespass, 349.

&c. were also abolished. But this act does not extend to the city of London, where several customs and bye-laws, excluding other than freemen from trading within the city, still exist.

(15) In 1 B. & C. 469, it was decided that a master is liable to maintain and instruct his apprentice during the entire term of apprenticeship, and that he has no power at common law to put an end to the contract of apprenticeship, for a single act of misconduct on the part of the apprentice.

vant, workman, or labourer assaults his master or dame, he shall suffer one year's imprisonment, and other open corporal punishment, not extending to life or limb [z] [16].

By service all servants and labourers, except apprentices, become entitled to wages: according to their agreement, if menial servants; or according to the appointment of the sheriff or sessions [17], if labourers or servants in husbandry: for the statutes for the regulation of wages extend to such servants only [a]; it being impossible for any magistrate to be a judge of the employment of menial servants, or of course to assess their wages [18].

III. How third parties are affected by the relation of master and servant or apprentice.

[429]

III. Let us, lastly, see how strangers may be affected by this relation of master and servant: or how a master may behave towards others on behalf of his servant; and what a servant may do on behalf of his master.

And, first, the master may *maintain*, that is, abet and assist his servant in any action at law against a stranger: whereas, in general, it is an offence against public justice to encourage suits and animosities, by helping to bear the expense of them, and is called in law maintenance [b]. A master also may bring an action against any man for beating or maiming his servant: but in such case he must assign, as a special reason for so doing, his own damage by the loss of his service; and this loss must be proved upon the trial [c] [19]. A

[z] Stat. 5 Eliz. c. 4, § 21.
[a] 2 Jones, 47.
[b] 2 Roll. Abr. 116.
[c] 9 Rep. 113.

(16) The section of the statute of Elizabeth which inflicted these penalties was repealed by 9 Geo. 4, c. 31, s. 1. By 7 & 8 Geo. 4, c. 29, s. 48, servants and clerks, who by virtue of their employment receive any money or other effects on their masters' account, and fraudulently embezzle the same, or any part thereof, shall be deemed to have feloniously stolen the same, and are liable to transportation for fourteen years.

(17) Neither the sheriff nor the justices have any authority now to fix wages or the prices of labour. (Vide supra, p. 427, n. 9).

(18) It may also be mentioned, that by ss. 28, 29, of the recent Bankrupt Act, 5 & 6 Vict. c. 122, which are nearly in the same terms as sect. 48 of 6 Geo. 4, c. 16, the commissioners may pay to the servants or clerks of the bankrupt, three months' salary or wages not exceeding 30*l.* each; and to his labourers or workmen 40*s.* each; and such servant or clerk, labourer, or workman may prove for the difference also, not exceeding 30*l.* or 40*s.* each respectively.

(19) See Selwyn's N. P. 999; 2 M. & S. 436; 4 B. & C. 660. And the jury may give damages for the loss

master likewise may justify an assault in defence of his servant, and a servant in defence of his master[d]: the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master[e]. Also, if any person do hire or retain my servant, being in my service, for which the servant departeth from me, and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them; but if the new master did not know that he is my servant, no action lies; unless he afterwards refuse to restore him upon information and demand[f]. The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages[20].

Liabilities of master and servant.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam, qui facit per alium, facit per se*[g]. Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful[21]. If an innkeeper's ser-

[430]

[d] 2 Roll. Abr. 546. [Llofft. 215].

[e] In like manner, by the laws of king Alfred, c. 38, a servant was allowed to fight for his master, a parent for his child, and a husband or father for the chastity of his wife or daughter.

[f] F. N. B. 167, 168.

[g] 4 Inst. 109.

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of service down to the time, when, as it appears by evidence, the servant may be expected to recover his ability to perform his duties. (11 A. & E. 301).

(20) Upon this principle it is, that he, who knowingly entices away a servant, is liable to an action at the suit of the master (6 Mod. 182); as also is he, who retains a servant in his service after due notice that he is under an unexpired contract to another master. (3 Burr. 1345; 6 T. R. 221). But the master may waive his action for the tort, and bring his action for whatever the servant has earned, while he is unlawfully in the service of another, as wages, prize-money, &c. (5 E. 39; 1 Taunt. 112; 3 M. & S. 191; see also 1 Bl. Rep. 375; 4 Taunt. 876).

(21) But if not by the express or implied command of his master, the master is not liable. (1 E. 106; 5 B. & C. 547; 4 B. & Ad. 590; 8 Ad. & El. 512; 6 M. & W. 499, and infra, p. 431, n. 25).

vants rob his guests, the master is bound to restitution: [h] for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam, qui non prohibet, cum prohibere possit, jubet* [22]. So likewise, if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master [i]: for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command [23].

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it: if I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation, that use to

[h] Noy's Max. c. 43.

[i] 1 Roll. Abr. 95.

(22) See also 8 Rep. 33; 5 T. R. 273, and 3 B. & A. 283. But an innkeeper does not incur this liability, if the guest take upon himself the care of his goods or neglect to exercise ordinary care in securing his property. (Holt, C. N. P. 209; 4 M. & S. 306; 1 B. & A. 59). See further infra, vol. 3, p. 165, n. 22. So also carriers are liable at common law for losses by robbery or accidental fire. (1 Inst. 89; 1 Wils. 281). To protect themselves from this liability, carriers were in the habit of giving notice that they required a premium in proportion to the risk run, where the goods were above a certain value. The construction of these notices, and the obligation of proving that the employer knew of them, having given rise to much litigation, 11 Geo. 4 and 1 Wm. 4, c. 68, was passed to limit the liability of carriers for losses in respect of gold, securities, &c. above the value of 10*l*., unless the nature of such goods be declared and the increased premium paid accordingly; but this act does not protect the carrier in respect of losses from the felonious acts of his servant nor from gross negligence. See further infra, vol. 3, p. 165, n. 23.

(23) Where it is the master's duty to see that the servant acts correctly, the master may be even criminally responsible for the servant's conduct; as where a baker's servant introduced noxious ingredients into bread. (3 M. & S. 111; 1 Ld. Raym. 264; 4 Campb. 12). So also an indictment for libel, contained in an article in a newspaper, will lie against a person interested in the profits, without shewing that he authorized the insertion of the libellous article. (1 M. & M. 437; 4 Tyr. 677). Nevertheless, the general rule is, that the master is not criminally liable for the criminal acts of his servant. (8 Rep. 59; 2 Str. 886).

transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant: but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up: for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority [k] [24].

If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect; if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehaviour [25]. Upon this principle, by the common law [l], if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master; because this negligence happened in his service; otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate ser- [431]

[k] Dr. & Stud. d. 2, c. 42; Noy's Max. c. 44. [l] Noy's Max. c. 44.

(24) The principles affecting contracts by servants with third parties, laid down in these paragraphs, are founded not so much on the relation of master or servant, as on that of principal and agent; a relation of, at least, equal importance to that of master and servant; but whose principles and rules it is impossible to condense into a note. The student will find a concise and clear legal view of this relation in the 5th Chapter of Smith's Compendium of Mercantile Law, and for further information, see Chitty *on* Contracts; Paley on Principal and Agent, and Story on Agency.

(25) Vide supra, p. 429, n. 21. In the late case of the Druid, reported 6 Jur. 441, it was held by Sir S. Lushington, that where there is neither previous authority nor subsequent adoption of an act of illegal violence by a servant, the master is not responsible for such tortious conduct. So again it was laid down by Mr. J. Coleridge, in *Lyons* v. *Martin*, (8 Ad. & El. 512), a case in which all the former authorities were cited, that the master is not liable for the tort of the servant, unless it were committed within the scope of the servant's ordinary authority, or some direct authority can be proved.

vice, and must himself answer the damage personally. But now the common law is, in the former case, altered by statute 6 Anne, c. 3, which ordains that no action shall be maintained against any in whose house or chamber any fire shall accidently begin; for their own loss is sufficient punishment for their own or their servant's carelessness[26]. But if such fire happens through negligence of any servant (whose loss is commonly very little), such servant shall forfeit 100*l.* to be distributed among the sufferers; and, in default of payment, shall be committed to some workhouse, and there kept to hard labour for eighteen months[m][27]. A master is, lastly, chargeable if any of his family layeth or casteth any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people[n]; for the master hath the superintendence and charge of all his household. And this also agrees with the civil law[o]; which holds that the *pater familias*, in this and similar cases, "*ob alterius culpam tenetur,*
[432] *sive servi, sive liberi.*"

We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in a servant, but never can be a gainer; he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong.

[m] Upon a similar principle, by the law of the twelve tables at Rome, a person by whose negligence any fire began, was bound to pay double to the sufferers; or, if he was not able to pay, was to suffer a corporal punishment.

[n] Noy's Max. c. 44.

[o] Ff. 9, 3, 1; Inst. 4, 5, 1.

(26) In the case of *Vaughan* v. *Menlove*, (4 Scott), it was held, that a party who had negligently managed a stack of hay on his premises, so that it ignited and injured his neighbour's premises, was liable for the damage. See also the present Lord Chancellor's observations in *Viscount Canterbury's case*, reported Jur. 225, and 12 Law Journal.

(27) By 14 Geo. 3, c. 78, which extends the statute of Anne to any fire on any close, estate, &c., the same penalties are imposed on negligent servants causing damage to the property of others, but the words "common gaol" are added to the words "workhouse or house of correction."

CHAPTER XV.

OF HUSBAND AND WIFE.

THE second private relation of persons is that of *marriage*, which includes the reciprocal rights and duties of husband and wife; or, as most of our elder law-books call them, of *baron* and *feme*. In the consideration of which I shall, in the first instance, inquire, how marriages may be contracted or made; shall next point out the manner in which they may be dissolved; and, shall, lastly, take a view of the legal effects and consequences of marriage. Husband and wife.

1. Our law considers marriage in no other light than as a civil contract [1]. The *holiness* of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment, therefore, or annulling [2] of incestuous or other unscriptural marriages, is the province of the spiritual courts; which act *pro salute animæ*[a]. And, taking it in a civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making I. How marriages may be contracted.

[a] Salk. 121.

(1) Upon this point, see Lord Stowell's judgment in *Dalrymple* v. *Dalrymple*, 2 Hag. 64, and Mr. Jacob's note to his edition of Ropér's Husband and Wife, vol. ii. pp. 445—501.

(2) By sect. 1 of 5 & 6 Wm. 4, c. 54, it is enacted, that all marriages celebrated before the passing of that act between persons being within the prohibited degrees of affinity shall not be annulled for that cause by any sentence of the ecclesiastical courts, unless pronounced in a suit depending at the time of the passing of the act; but this section does not affect marriages between persons being within the prohibited degrees of consanguinity; and see infra, p. 435, n. 5.

it were, in the first place, *willing* to contract: secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law.

First, the parties must be willing.

First, they must be *willing* to contract. "*Consensus non concubitus, faciat nuptias,*" is the maxim of the civil law in this case [b]: and it is adopted by the common lawyers [c], who indeed have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws.

[434]

and secondly, able to contract.

Secondly, they must be *able* to contract. In general all persons are able to contract themselves in marriage, unless they labour under some particular disabilities, and incapacities. What these are, it will be here our business to inquire.

Disabilities by the canon law.—These in our law only make the marriage voidable.

Now these *disabilities* are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these in our law only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract; consanguinity, or relation by blood; and affinity, or relation by marriage: and some particular corporal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence: it therefore being sinful in the persons who labour under them to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offence, *pro salute animarum.* But such marriages not being void *ab initio,* but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For, after the death of either of them, the courts of common law will not suffer the spiritual courts to declare such marriages to have been void; because such declaration cannot now tend to the reformation of the parties [d]. And therefore when a man had married his first wife's sister, and after her death the bishop's court was proceeding to annul the marriage and bastardize the issue, the court of king's bench granted a pro-

[435]

[b] Ff. 50, 17, 30. [c] Co. Litt. 33. [d] Co. Litt. 33.

hibition *quoad hoc*; but permitted them to proceed to punish the husband for incest [e]. These canonical disabilities being entirely the province of the ecclesiastical courts, our books are perfectly silent concerning them. But there are a few statutes which serve as directories to those courts, of which it will be proper to take notice. By statute 32 Hen. VIII. c. 38, it is declared, that all persons may lawfully marry, but such as are prohibited by God's law; and that all marriages contracted by lawful persons in the face of the church, and consummated with bodily knowledge and fruit of children, shall be indissoluble. And, (because, in the times of popery, a great variety of degrees of kindred were made impediments to marriage, which impediments might however be bought off for money) it is declared by the same statute, that nothing (God's law excepted) shall impeach any marriage, but within the Levitical degrees [3]; the farthest of which is that between uncle and niece [f]. By the same statute all impediments arising from pre-contracts to other persons were abolished and declared of none effect, unless they had been consummated with bodily knowledge: in which case the canon law holds such contract to be a marriage *de facto*. But this branch of the statute was repealed by statute 2 & 3 Ed. VI. c. 23. How far the act of 26 Geo. II. c. 33 [4]. (which pro-

[e] 2 Salk. 548. [f] Gilb. Rep. 158.

(3) See Levit. ch. xviii; and for a table of Levitical degrees, see Burn's Eccl. Law, tit. Marriage. The prohibited marriages are those between parties related to each other, either by consanguinity or affinity, within the third degree inclusive. (Gibs. Cod. 413). For the computation of these degrees, which is by the mode of the civil law, see vol. ii. p. 207. Marriages between parties who are in the fourth or any higher degree are lawful; as between first cousins, a nephew and a great aunt, or a niece and her great uncle. Relationship by affinity always arises from the marriage of one of the parties so related, but it extends only to the *consanguinei* of each party respectively. (Gibs. Cod. 412). Thus a husband is related by affinity to all the *consanguinei* of his wife, and *vice versâ* a wife to all the *consanguinei* of her husband; and consequently, a man cannot marry the sister of his deceased wife, or her aunt, or niece, or daughter by a former husband. (2 Phill. 18, 359). But a man may marry his brother's wife's sister, and a widower may marry the widow of his wife's brother, for no relationship or affinity whatever exists between the parties.

(4) The great object of this statute was to put a stop to the scandalous practices at the Fleet, May-fair, and elsewhere, where boys above fourteen and girls above twelve were forced or entrapped into contracts of marriage *per verba de præsenti*, in the presence

hibits all suits in ecclesiastical courts to compel a marriage, in consequence of any contract) may collaterally extend to revive this clause of Henry VIII.'s statute, and abolish the impediment of pre-contract, I leave to be considered by the canonists [5].

Disabilities by municipal law.

The other sort of disabilities are those which are created, or at least enforced, by the municipal laws. And though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offence, as on account of the civil inconveniences they draw after them. These civil disabilities make the contract void *ab initio*, and not merely voidable; not that they [436] dissolve a contract already formed, but they render the parties incapable of performing any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction. And, if any persons under these legal incapacities come together, it is a meretricious and not a matrimonial union.

1. Prior marriage.

1. The first of these legal disabilities is a prior marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void [6]: polygamy being condemned both by the law of the New Testament, and the policy of all prudent states, especially in these northern climates. And Justinian, even in the climate of

[6] Bro. Abr. tit. Bastardy, pl. 8.

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of a person in holy orders; which contracts, when followed by consummation, were valid marriages; see Parl. Hist. vol. xv. p. 1—87.

(5) The statute 5 & 6 Wm. 4, c. 54, by sect. 2 of which all future marriages between persons within the prohibited degrees, either of affinity or consanguinity, are declared absolutely void, and not merely voidable, would seem to bring these marriages within the jurisdiction of the courts of common law, the parties being now under a civil disability to contract.

(6) In the recent case of *Reg.* v. *Millis*, reported 7 Jur. 911, 983, it was held, that a marriage celebrated in Ireland by a presbyterian minister was not such a marriage as to invalidate a subsequent marriage otherwise valid, nor was the party contracting the latter liable to the penalties of bigamy. This decision being thought to have a very great effect upon titles to property and to be fraught with other inconveniencies, all marriages which had been so celebrated were declared valid by 5 & 6 Vict. c. 113, and 6 & 7 Vict. c. 39; but these acts are merely retrospective, and the above cited case has thrown great doubt over such marriages in the colonies and those between Jews or Quakers, which are not within the 26 Geo. 2, c. 33.

modern Turkey, is express[h], that "*duas uxores eodem tempore habere non licet.*"

2. Want of age.

2. The next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting: *a fortiori*, therefore, it ought to avoid this, the most important contract of any. Therefore, if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law[i]. But the canon law pays a greater regard to the constitution, than the age, of the parties[k]: for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be. And in our law it is so far a marriage that, if at the age of consent they agree to continue together, they need not be married again[l]. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion he may disagree as well as she may; for in contracts the obligation must be mutual; both must be bound, or neither: and so it is, *vice versâ*, when the wife is of years of discretion, and the husband under[m 7].

3. Want of consent of parents.

3. Another incapacity arises from want of consent of parents or guardians. By the common-law, if the parties themselves were of age to consent, there wanted no other concurrence to make the marriage valid; and this was agreeable to the canon law. But, by several statutes[n], penalties of 100*l.* are laid on every clergyman who marries a couple either without publication of banns (which may give notice to parents or guardians), or without a license, to

[437]

[h] Inst. 1, 10, 6.
[i] Leon. Constit. 109.
[k] Decretal. l. 4, tit. 2, qu. 3.
[l] Co. Litt. 79.
[m] Co. Litt. 79.
[n] 6 & 7 Wm. III. c. 6; 7 & 8 Wm. III. c. 35; 10 Ann. c. 19.

(7) This doctrine does not extend beyond the actual marriage contract, referred to the ages of fourteen and twelve; for it has long been clearly settled that if one of two parties to a contract to marry *in futuro*, be under twenty-one, and the other above that age, the former only can maintain an action for a breach of the promise; for such contracts are voidable by the minor on attaining majority; see Str. 937; S. C. Fitz. 175, 275; 6 Taunt. 118; 2 M. & S. 205.

obtain which the consent of parents or guardians must be sworn to[8]. And by the statute 4 & 5 Ph. & M. c. 8, whosoever marries any woman child under the age of sixteen years, without consent of parents or guardians, shall be subject to fine, or five years' imprisonment: and her estate during the husband's life shall go to and be enjoyed by the next heir[9]. The civil law indeed required the consent of the parent or tutor at all ages; unless the children were emancipated, or out of the parent's power[o]: and if such consent from the father was wanting, the marriage was null, and the children illegitimate[p], but the consent of the mother or guardians, if unreasonably withheld, might be redressed and supplied by the judge, or the president of the province[q]: and if the father was *non compos*, a similar remedy was given[r]. These provisions are adopted and imitated by the French and Hollanders, with this difference, that in France the sons cannot marry without consent of parents till thirty years of age, nor the daughters till twenty-five[10]; and in Holland, the sons are at their own disposal at twenty-five[s], and the daughters at twenty[t]. Thus hath stood, and thus at present stands, the law in other neighbouring countries. And it has

[o] Ff. 23, 2, 2, & 18.
[p] Ff. 1, 5, 11.
[q] Cod. 5, 4, 1, & 20.
[r] Inst. 1, 10, 1.
[s] Domat. of dowries, § 2; Montesq. Sp. L. 23, 7.
[t] Vinnius in Inst. l. 1, t. 10.

(8) By the Marriage Act, 4 Geo. 4, c. 76 (repealing 26 Geo. 2, c. 33, and 3 Geo. 4, c. 75), it is enacted (sect. 14), that no license shall be granted unless one of the parties shall make oath of his belief that there is no impediment to the marriage arising from relationship, or any other lawful cause, that one of the parties has resided in the parish, within which the marriage is to be solemnized, for the space of fifteen days immediately preceding, and, if one of the parties (not being a widower or widow), be a minor, that the consent of the person whose consent is required, (for which, see sects. 16, 17), has been obtained, or that there is no such person. If the marriage be under publication of banns, and one of the parties, (not being a widow or widower), be a minor, such publication becomes void, if the person whose consent is required signifies his dissent at the time of publication. But a clergyman solemnizing a marriage without notice of such dissent is not punishable; see sect. 8.

(9) By the Marriage Act when a valid marriage is obtained with an infant by the false oath or fraudulent procurement of either party, such party forfeits all property which would otherwise pass by the marriage.

(10) But sons under thirty and above twenty-five, and daughters under twenty-five and above twenty-one, may lawfully contract marriage, after three formal but ineffectual endeavours to obtain such consent. (Cod. Civ. tit. 1, cap. 1).

lately been thought proper to introduce somewhat of the same policy into our laws by statute 26 Geo. II. c. 33, whereby it is enacted, that all marriages celebrated by licence (for banns suppose notice) where either of the parties is under twenty-one (not being a widow or widower, who are [438] supposed emancipated), without the consent of the father, or, if he be not living, of the mother or guardians [11], shall be absolutely void [12]. A like provision is made as in the civil law, where the mother or guardian is *non compos*, beyond sea, or unreasonably froward, to dispense with such consent at the discretion of the lord chancellor: but no provision is made, in case the father should labour under any mental or other incapacity [13]. Much may be, and much has been said, both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine

(11) If the father be dead, the consent required by the present Marriage Act (sects. 16, 17), is of the guardian of the person of the minor; and if no such guardian shall have been lawfully appointed, of the mother being unmarried; and if there be no mother unmarried, of the guardian appointed by the Court of Chancery. If such party be *non compos*, or (except the father, see 3 M. & C. 471,) be beyond the seas, or unreasonably, or from undue motives withhold consent, the minor may, by petition to the Lord Chancellor, obtain permission to marry.

(12) Marriages celebrated without the consent required by the 17th section of the Marriage Act, are not void; see 8 B. & C. 29. It also may be observed, that although the neglect of the rules prescribed by this act subjects the parties to penalties, yet the contract is by sect. 22, rendered absolutely void to all intents and purposes only where both (4 B. & Ad. 640) parties knowingly and wilfully consent to the solemnization of such marriage without due publication of banns or license lawfully obtained, or by a person not being in holy orders, or (unless by special license) in a place not duly licensed; in which cases it is also a felony; see sect. 39.

(13) By the Registration of Marriage Act, 6 & 7 Wm. 4, cc. 85, 86, (amended by 7 Wm. 4 and 1 Vict. c. 22, and 3 & 4 Vict. cc. 72, 92), all marriages howsoever solemnized must be registered; and, for the relief of dissenters, it was also enacted, that notice to the superintendant-registrar, entry in a book open to public inspection at his office, and reading such entries before the board of guardians at three weekly meetings, may be substituted for the publication of banns. After such notice, the superintendent-registrar, (unless previously forbidden by a party whose consent would have been required to the marriage before the passing of the act), may issue his certificate for the marriage, which may take place either at the said office or in any specified building registered for the solemnization of marriages, but according to the mode prescribed by the act; which is framed by strict analogy to the General Marriage Act, but so as to render the solemnization of the marriage, in the church and by a clergyman of the establishment, no longer indispensable, but optional.

marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriages, especially among the lower class, are evidently detrimental to the public, by hindering the increase of the people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes, and thereby destroying one end of society and government, which is *concubitu prohibere vago*. And of this last inconvenience the Roman laws were so sensible, that at the same time that they forbad marriage without the consent of parents or guardians, they were less rigorous upon that very account with regard to other restraints: for if a parent did not provide a husband for his daughter, by the time she arrived at the age of twenty-five, and she afterwards made a slip in her conduct, he was not allowed to disinherit her upon that account, "*quia non sua culpa, sed parentum, id commisisse cognoscitur*" [u].

4. Want of reason.

4. A fourth incapacity is want of reason; without a competent share of which, as no other, so neither can the matrimonial contract, be valid [w]. It was formerly adjudged, that the issue of an idiot was legitimate, and consequently that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to any thing. And therefore the civil law judged much more sensibly when it made such deprivations of reason a previous impediment; though [439] not a cause of divorce, if they happened after marriage [x]. And modern resolutions have adhered to the reason of the civil law, by determining [y] that the marriage of a lunatic, not being in a lucid interval, was absolutely void. But as it might be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, upon this account (concurring with some private family [z] reasons) the statute 15 Geo. II. c. 30. has provided that the marriage of lunatics and persons under phrenzies (if found lunatics under a commission, or committed to the care of trustees by any act of parliament), before they are declared of sound mind by the lord chancellor or the majority of such trustees, shall be totally void.

[u] Nov. 115, § 11.
[w] 1 Roll. Abr. 357.
[x] Ff. 23, tit. 1, l. 8, & tit. 2, l. 16.
[y] Morrison's case *coram delegat.*
[z] See private acts 23 Geo. II. c. 6.

5. Parties must contract according to form of law.

Lastly, the parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made, *per verba de præsenti*, or in words of the present tense, and in case of cohabitation *per verba de futuro* also, between persons able to contract, was before the late act deemed a valid marriage to many purposes[14]; and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiæ*. But these verbal contracts are now of no force to compel a future marriage[a]. Neither is any marriage at present valid, that is not celebrated in some parish church or public chapel, unless by dispensation from the archbishop of Canterbury. It must also be preceded by publication of banns, or by licence from the spiritual judge. Many other formalities are likewise prescribed by the act; the neglect of which, though penal, does not invalidate the marriage. It is held to be also essential to a marriage, that it be performed by a person in orders[b]; though the intervention of a priest to solemnize this contract is merely *juris positivi*, and not *juris naturalis aut divini:* it being said that pope Innocent the Third was the first who ordained the celebration of marriage in the church[c]; before which it was totally a civil contract. And in the times [440] of the grand rebellion, all marriages were performed by the justices of the peace; and these marriages were declared valid, without any fresh solemnization, by statute 12 Car. II. c. 33. But, as the law now stands, we may upon the whole collect, that no marriage by the temporal law is *ipso facto void*, that is celebrated by a person in orders[15],—in a parish church or public chapel[16] (or elsewhere, by special dispensation)—in pursuance of banns or a licence[17],—between

[a] Stat. 26 Geo. II. c. 33. [b] Salk. 119. [c] Moor. 170.

(14) Upon a full consideration of all the cases down to the passing of Lord Hardwicke's Act, it was held by Lord C. J. Tindal and the other judges, in the late case of *Rex* v. *Millis*, already cited, supra, p. 436, n. 6, that by the common law of England a contract *per verba de præsenti*, is not a valid marriage, unless entered into in the presence of an ordained minister.

(15) This, as has been already observed, (note 13,) is no longer indispensable.

(16) Or in some other building duly registered; see 6 & 7 Wm. 4, c. 85, s. 18.

(17) Or a superintendent-registrar's certificate; see 6 & 7 Wm. 4, c. 85, s. 11.

single persons [18],—consenting,—of sound mind,—and of the age of twenty-one years; or of the age of fourteen in males and twelve in females, with consent of parents or guardians, or without in case of widowhood. And no marriage is *voidable* by the ecclesiastical law, after the death of either of the parties, nor during their lives, unless for the canonical impediments of pre-contract, if that indeed still exists; of consanguinity; and of affinity, or corporal imbecility, subsisting previous to the marriage.

II. How marriages may be dissolved.

II. I am next to consider the manner in which marriages may be dissolved; and this is either by death, or divorce. There are two kinds of divorce, the one total, the other partial; the one *a vinculo matrimonii*, the other merely *a mensa et thoro*. The total divorce, *a vinculo matrimonii*, must be for some of the canonical causes of impediment before mentioned; and those, existing *before* the marriage, as is always the case in consanguinity; not supervenient, or arising *afterwards*, as may be the case in affinity or corporal imbecility. For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio;* and the parties are therefore separated *pro salute animarum:* for which reason, as was before observed, no divorce can be obtained, but during the life of the parties. The issue of such marriage as is thus entirely dissolved, are bastards [d].

By divorce a vinculo matrimonii.

By divorce a mensa et thoro.

Divorce *a mensa et thoro* is when the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving it; but for some supervenient cause, it becomes improper or impossible for the parties to live together: as in case of intolerable ill temper [19], or adultery in either of the parties. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made. And

[441]

[d] Co. Litt. 235.

(18) Not being within the prohibited degrees of relationship; vide supra, p. 435, n. 3.

(19) But it must be so intolerable as to amount to *sævitiam*, *i. e.* such, that the conjugal connection cannot be continued without danger to the person or health of the party applying for the divorce; see 1 Hag. 36.

this is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause, why a man may put away his wife and marry another [e]. The civil law, which is partly of pagan original, allows many causes of absolute divorce; and some of them pretty severe ones (as if a wife goes to the theatre or the public games, without the knowledge and consent of the husband [f]): but among them adultery is the principal, and with reason named the first [g]. But with us in England adultery is only a cause of separation from bed and board [h]: for which the best reason that can be given is, that if divorces were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties [i], which is now prohibited by the canons [k]. However, divorces *a vinculo matrimonii*, for adultery, have of late years been frequently granted by act of parliament [20].

In cases of divorce *a mensa et thoro*, the law allows alimony to the wife; which is that allowance which is made to a woman for her support out of the husband's estate: being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her *estovers*; for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law *de estoveriis habendis*, in order to recover it [l]. It is generally proportioned to the rank and quality of the parties. But in cases of elopement and living with an adulterer, the law allows her no alimony [m]. Of alimony.

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III. Having thus shewn how marriages may be made, or dissolved, I come now, lastly, to speak of the legal consequences of such making, or dissolution. III. Legal consequences of marriage in general.

[e] Matt. xix. 9.
[f] Nov. 117.
[g] Cod. 5, 17, 8.
[h] Moor. 683.
[i] 2 Mod. 314.
[k] Can. 1603, c. 105.
[l] 1 Lev. 6.
[m] Cowel. tit. Alimony.

(20) But only upon strict proof of the adultery; and, in general, only after a sentence of divorce *a mensa et thoro*, by the ecclesiastical courts, and, (if the husband be the petitioner), after verdict against the adulterer in a trial at law; see the case in Macqueen on Parl. Divorce, pp. 551—668.

Husband and wife but one person.

By marriage, the husband and wife are one person in law[n]: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *feme-covert*, *fœmina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely *personal*. For this reason, a man cannot grant any thing to his wife, or enter into covenant with her[o], for the grant would be to suppose her separate existence: and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage[p]. A woman indeed may be attorney[21] for her husband[q]; for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath any thing to his wife by will; for that cannot take effect till the coverture is determined by his death[r]. The husband is bound to provide his wife with necessaries by law, as much as himself; and if she contracts debts for them, he is obliged to pay them[s]; but, for any thing besides necessaries, he is not chargeable[t]. Also if a wife elopes, and lives with another man, the husband is not chargeable even for necessaries[u]: at least if the person who furnishes them is

How far contracts and grants between husband and wife are binding.

Liability of husband for contracts of wife.

[443]

[n] Co. Litt. 112.
[o] Ibid.
[p] Cro. Car. 551.
[q] F. N. B. 27.
[r] Co. Litt. 112.
[s] Salk. 118.
[t] 1 Sid. 120.
[u] Stra 647.

(21) So she may also be agent for him; see 2 Man. & Gr. 172. In fact, it is upon an express or implied authority to the wife, as agent for her husband to pledge his credit, that his liability for her contracts is founded; see 3 M. & W. 481. It was solemnly decided in the great case of *Marshall* v. *Rutter*, (8 T. R. 545), that at law a married woman cannot make herself liable upon any contract; see also 11 East, 301; 2 B. & P. 226; 3 B. & C. 291.

sufficiently apprized of her elopement [22] [w]. If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together [x]. If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name as well as her own [y]: neither can she be sued, without making the husband a defendant [z]. There is indeed one case where the wife shall sue and be sued as a feme sole, *viz.* where the husband has abjured the realm, or is banished [a], for then he is dead in law; and, the husband being thus disabled to sue for or defend the wife, it would be most unreasonable, if she had no remedy, or could make no defence at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately [b]; for the union is only a civil union. But, in trials of any sort, they are not allowed to be evidence for or against each other [c]: partly because it is impossible their testimony should be indifferent; but principally because of the union of person: and therefore, if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, "*nemo propria causa testis esse debet*;" and if *against* each other, they would contradict another maxim, "*nemo tenetur seipsum accusare.*" But where the offence is directly against the person of the wife, this rule has been usually dispensed with [d]: and therefore, by statute 3 Hen. VII. c. 2, in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract: and also there is another maxim of law, that no man shall take advantage of

Of suits at law, by or against husband and wife.

As to their evidence for or against each other.

[w] 1 Lev. 5.
[x] 3 Mod. 186.
[y] Salk. 119; 1 Roll. Abr. 347.
[z] Bro. Error, 173; 1 Leon. 312; 1 Sid. 120. This was also the practice in the courts at Athens. (Pot. Antiq. b. 1, c. 21).
[a] Co. Litt. 133.
[b] 1 Hawk. P. C. 3.
[c] 2 Hawk. P. C. 431.
[d] State trials, vol. 1. Lord Audley's case; Stra. 633.

(22) If the husband allow her a separate maintenance adequate for her support, he is not liable even for her necessaries,; and notice to the tradesmen of such separate allowances is immaterial; see 3 M. & W. 481.

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his own wrong: which the ravisher here would do, if by forcibly marrying a woman he could prevent her from being a witness, who is perhaps the only witness to that very fact[23].

In civil law considered as distinct persons.

In the civil law the husband and the wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries[e]: and, therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband[24].

When not considered as one person.

But, though our law in general considers man and wife as one person, yet, there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void; except it be a fine[25], or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary[g]. She cannot by will devise lands to her husband, unless under special circumstances: for at the time of making it she is supposed to be under his coercion[h]. And in some felonies and other inferior crimes, committed by her, through constraint of her husband, the law excuses her[i]; but this extends not to treason or murder.

[e] Cod. 4, 12, 1.
[f] 2 Roll. Abr. 298.
[g] Litt. § 669, 670.
[h] Co. Litt. 112.
[i] 1 Hawk. P. C. 2

(23) In cases of bigamy the second wife may be examined as a witness either for or against her pretended husband, but only after proof of the first marriage; see Phill. on Evid. vol. i. p. 79; so she may be examined for the discovery of her husband's property, under the Bankrupt Act, 6 Geo. 4, c. 16, s. 37.

(24) In courts of equity also the husband and wife are distinct persons, consequently the wife may have a separate estate under the doctrine of trusts; and she may bind the same by her separate contracts; and by her next friend she may sue and be sued in respect of such contracts or in relation to such estate.

(25) Or a deed acknowledged as directed by the act for the abolition of fines and recoveries and substitution of more easy modes of assurance; 3 & 4 Wm. 4, c. 74. As to her execution of powers, see Sugd. on Powers, ch. iv. sect. 1. And it has been recently held that a wife cannot grant a lease to her second husband in pursuance of a power reserved in her marriage settlement with her first husband; *Doe* d. *Hartley* v. *Gilbert*, (8 Jur. 37); from which and other cases it seems, that the wife cannot claim by law any power to act independently of or in opposition to her husband, unless where she is acting *in autre droit* and not in her own right.

Right of husband to correct his wife.

The husband also (by the old law) might give his wife moderate correction [k]. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds [l], and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet* [m]. The civil law gave the husband the same, or a larger, authority over his wife: allowing him for some misdemeanors, *flagellis et fustibus acriter verberare uxorem;* for others, only *modicam castigationem adhibere* [n]. But with us, in the politer reign of Charles the Second, this power of correction began to be doubted [o]: and a wife may now have security of the peace against her husband [p]; or, in return, a husband against his wife [q]. Yet the lower rank of people, who were always fond of the old common law, still claim, and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour [26].

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These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England [27]!

[k] 1 Hawk. P. C. 130.
[l] Moor. 874.
[m] F. N. B. 80.
[n] Nov. 117, c. 14, and Van Leeuwen in loc.
[o] 1 Sid. 113; 3 Keb. 433.
[p] 2 Lev. 128.
[q] Stra. 1207.
[r] Stra. 478, 875.

(26) There can be no question respecting the common law right of a husband to restrain his wife of her personal liberty, with a view to prevent her going into society of which he disapproves, or otherwise disobeying his rightful authority; but such right must not be exercised unnecessarily or with undue severity; and the moment that the wife, by her return to her conjugal duties, makes restraint of her person unnecessary, such restraint becomes unlawful; see Mr J. Coleridge's observations, *in re Cochrane*, 8 Dowl. P. C. 631.

(27). With the exception of the equitable doctrine of separate estates,

it is difficult to find any substantial grounds upon which to support Blackstone's conclusion that the female sex is a favourite of our laws. By the common law all women, whether married or single, were denied the benefit of clergy; and, till 3 & 4 Wm. & M. c. 9, might have been executed for the first offence in simple larceny and other crimes, how learned soever they might have been; while males, who could read, were for the same crime punished only with burning in the hand and a few months imprisonment; vide infra, vol. 4, p. 369. A woman guilty of treason or of the murder of her husband, (which latter offence, until 6 & 7 Wm. 4, c. 30, was considered by our law, as a species of treason), might, until 30 Geo. 3, c. 48, be punished by being burnt alive; while, if a husband murdered his wife, the crime was in law no greater than if he had murdered a mere stranger. With regard to civil rights, though the law divides the personal estate of an intestate equally between males and females, yet the real estate descends to a male to the exclusion of all females of the same degree. Again, a widow's estate in dower is only one-third that of a widower in curtesy; vide infra, vol. ii. pp. 126, 129. It may also be remarked that all the rights and protection from liability mentioned by Blackstone, as being conferred upon women in their married state, are found in their effect to be quite as beneficial to their husbands and children as to themselves. No strength, however, is added to the argument by contending, as Mr. Christian does, that women, at least spinsters, have reason to complain of injustice in that they are excluded from voting for members of parliament, for they might as well complain of being excluded from the jury lists or the commission of the peace. Their liability to taxation is generally urged as the reason for their admission to the franchise, upon the maxim that taxation and representation are, or should be, inseparable; but it would be obviously quite as much to the purpose to urge that, since the law protects them, equally with the other sex, in their persons and property, they ought to be ballotted for the militia service and liable to answer the sheriff's summons for the *posse comitatus*, upon the maxim that protection and allegiance are inseparable. Perhaps the most striking instance of the want of favour of our laws to the sex is to be found in the right of custody of the persons of infants, which, until very recently, (2 & 3 Vict. c. 54), was given to the father to the entire exclusion of the mother, who could not even see them without her husband's permission. Sound and conclusive arguments may indeed be urged in support of most, if not all of the distinctions between the legal positions of the sexes, but there seems, as Mr. Christian well concludes his observations, "little reason to pay a compliment to our laws for their respect and favour to the female sex."

CHAPTER XVI.

OF PARENT AND CHILD.

THE next, and the most universal relation in nature, is immediately derived from the preceding, being that between parent and child. Parent and child.

Children are of two sorts; legitimate and spurious, or bastards; each of which we shall consider in their order; and, first, of legitimate children.

I. A legitimate child is he that is born in lawful wedlock[1], or within a competent time afterwards[2]. "*Pater est quem nuptiæ demonstrant*," is the rule of the civil law[a]; and this holds with the civilians, whether the nuptials happen before, or after, the birth of the child. With us in England the rule is narrowed, for the nuptials must be precedent to the birth; of which more will be said when we come to consider the case of bastardy. At present let us inquire into, 1. The legal duties of parents to their legitimate children. 2. Their power over them. 3. The duties of such children to their parents. I. Legitimate children.

1. And, first, the duties of parents to legitimate children: which principally consist in three particulars; their maintenance, their protection, and their education. 1st, Duties of parents.

[a] Ff. 2, 4, 5.

(1) In the great case of the *Antenatus* (*Doe* v. *Vardill*, 5 B. & C. 43, 8, 44; 6 Bing. N. C. 385; 6 Bligh. N. S. 479; 9, 32; 2 Cl. & Fin. 582; Moylan's Report of the case), it was decided, that even where a bastard, by the subsequent marriage of his parents, becomes legitimate according to the laws of the country, in which he was born, he is nevertheless still a bastard, so far as regards the inheritance of lands in England; see, however, Story's Conflict of Laws, p. 117—143, and 7 Cl. & Fin. 817, 842.

(2) As to this period, vide infra, p. 456.

The duty of maintaining children.

The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation, says Puffendorf[b], laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect *right* of receiving maintenance from their parents. And the president Montesquieu[c] has a very just observation upon this head: that the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children: for that ascertains and makes known the person who is bound to fulfil this obligation: whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way;—shame, remorse, the constraint of her sex, and the rigour of laws;—that stifle her inclinations to perform this duty; and besides, she generally wants ability.

The municipal laws of all well-regulated states have taken care to enforce this duty: though Providence has done it more effectually than any laws, by implanting in the breast of every parent that natural στοργη or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children can totally suppress or extinguish.

The civil law[d] obliges the parent to provide maintenance for his child: and, if he refuses, "*judex de ea re cognoscet.*" Nay, it carries this matter so far, that it will not suffer a parent at his death totally to disinherit his child, without expressly giving his reason for so doing; and there are fourteen such reasons reckoned up[e], which may justify such disinherison. If the parent alleged no reason, or a bad, or a false one, the child might set the will aside, *tanquam testamentum inofficiosum*, a testament contrary to the natural duty [448] of the parent. And it is remarkable under what colour the children were to move for relief in such a case; by suggest-

[b] L. of N. l. 4, c. 11.
[c] Sp. L. b. 23, c. 2.
[d] Ff. 25, 3, 5.
[e] Nov. 115.

ing that the parent had lost the use of his reason, when he made the *inofficious* testament. And this, as Puffendorf observes[f], was not to bring into dispute the testator's power of disinheriting his own offspring; but to examine the motives upon which he did it: and, if they were found defective in reason, then to set them aside. But perhaps this is going rather too far; every man has, or ought to have, by the laws of society, a power over his own property: and, as Grotius very well distinguishes[g], natural right obliges to give a *necessary* maintenance to children; but what is more than that they have no other right to, than as it is given them by the favour of their parents, or the positive constitutions of the municipal law.

how enforced and provided for by law.

Let us next see what provision our own laws have made for this natural duty. It is a principle of law [h], that there is an obligation on every man to provide for those descended from his loins[3]; and the manner, in which this obligation shall be performed, is thus pointed out[i]. The father and mother, grandfather and grandmother of poor impotent persons shall maintain them at their own charges, if of sufficient ability, according as the quarter session shall direct[4]: and if a parent runs away[k], and leaves his children, the churchwardens and overseers of the parish shall[5] seize his rents,

[f] l. 4, c. 11, § 7.
[g] De. j. b. et p. l. 2, c. 7, n. 3.
[h] Raym. 500.
[i] Stat. 43 Eliz. c. 2.
[k] Stat. 5 Geo. I. c. 8.

(3) But the common law of England never afforded any means of enforcing it, if it existed; see 4 E. 84; 4 Ad. & El. 899; though it seems to be an indictable offence to refuse or neglect to provide sufficient food, bedding, &c. and so to injure the health of any infant of tender years, servant, apprentice, or child, unable to provide for itself, whom the party is obliged by duty or contract to provide for; see Russ. & Ry. C. C. 20; 2 Camp 650.

(4) Or two justices in petty session, subject to appeal to the quarter sessions; see 59 Geo. 3, c. 12, s. 26. This liability may be enforced by sect. 56 of the Poor-Law Amendment Act, (4 & 5 Wm. 4, c. 76), which enacts, that all relief given under that law to any child or children under the age of sixteen years (not being blind or deaf and dumb), shall be considered as relief to the father, or if he be dead to his widow, and may be recovered from such persons by the mode prescribed in the act; see sect. 78.

(5) But not without an order from two justices, which must state for how long the rents are to be appropriated, how much of such goods and chattels are to be seized, and the amount of relief to be raised; see 6 E. 166.

goods, and chattels, and dispose of them toward their relief. By the interpretations which the courts of law have made upon these statutes, if a mother or grandmother marries again, and was before such second marriage of sufficient ability to keep the child, the husband shall be charged to maintain it[1]: for this being a debt of hers, when single, shall like others extend to charge the husband[6]. But at her death, the relation being dissolved, the husband is under no farther obligation.

[449] No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident; and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20*s.* a month[7]. For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence: but thought it unjust to oblige the parent against his will to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favours. Yet, as nothing is so apt to stifle the calls of nature as religious bigotry, it enacted[m] that if any popish parent shall refuse to allow his protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor shall by order of court constrain him to do what is

[1] Styles, 283; 2 Bulstr. 346.

[m] Stat. 11 & 12 Wm. III. c. 4.

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(6) This doctrine has been overruled, and the obligation in the text decided to extend only to relations by blood; see 2 Str. 955; 4 T. R. 118; 4 E. 76, 82; 4 B. & A. 118. But by the 57th sect. of the Poor-Law Amendment Act, (4 & 5 Wm. 4, c. 76), the husband by his marriage becomes liable to maintain the children of his wife, whether legitimate or illegitimate, until the age of sixteen years or the death of the mother.

(7) The amount of maintenance is in the discretion of the justices, and is not limited by the amount of the penalty for disobedience. If the father disobey the order, he may also be proceeded against by indictment (2 Burr. 799); or his goods may be distrained under 43 Eliz. c. 2, ss. 2, 11.

A father is also liable on his child's contracts for necessaries, but only on proof of an express or implied assumpsit; see 6 A. & E. 710. What articles are necessaries, is a question of fact, to be decided by the jury under the direction of the court, after proof of the infant's age and station in life; see 6 M. & W. 42; 1 Man. & Gr. 550; and infra, p. 466, n. 25.

just and reasonable. But this did not extend to persons of another religion, of no less bitterness and bigotry than the popish: and therefore in the very next year we find an instance of a Jew of immense riches, whose only daughter having embraced Christianity, he turned her out of doors; and on her application for relief, it was held she was entitled to none[n 8]. But this gave occasion[o] to another statute[p], which ordains, that if Jewish parents refuse to allow their protestant children a fitting maintenance suitable to the fortune of the parent, the lord chancellor on complaint, may make such order therein as he shall see proper.

Our law has made no provision to prevent the disinheriting of children by will: leaving every man's property in his own disposal, upon a principle of liberty in this, as well as every other action; though perhaps it had not been amiss, if the [450] parent had been bound to leave them at the least a necessary subsistence. Indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage-articles. Heirs also, and children, are favourites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words; there being required the utmost certainty of the testator's intentions to take away the right of an heir[q 9].

The duty of protecting children.

From the duty of maintenance we may easily pass to that of *protection*, which is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may by our laws maintain and uphold his children in their law-suits without being guilty of the legal crime of maintaining quarrels[r]. A parent may also justify

[n] Lord Raym. 699.
[o] Com. Journ. 18 Feb.; 12 Mar. 1701.
[p] 1 Ann. st. 1, c. 30.
[q] 1 Lev. 130.
[r] 2 Inst. 564.

(8) But on referring to the case, it will be seen that this decision was not based on her want of title to relief, but on the want of a statement in the magistrate's order that she was likely to become chargeable to the parish.

(9) The favour of our laws to heirs appears also in granting issues to try the validity of wills purporting to disinherit, in the doctrine of election, in all questions of costs, in the legacy duties, and many other instances.

an assault and battery in defence of the persons of his children[s]: nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel by beating the other boy, of which beating he afterwards unfortunately died; it was not held to be murder, but manslaughter merely[t 10]. Such indulgence does the law shew to the frailty of human nature, and the workings of parental affection.

The duty of educating children.

The last duty of parents to their children is that of giving them an *education* suitable to their station in life; a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes[u], it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the
[451] municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labour under those griefs and inconveniences, which his family, so uninstructed, will be sure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation; since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children[w]; and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. The rich indeed are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family. Yet, in one case, that of religion,

[s] 1 Hawk. P. C. 131.
[t] Cro. Jac. 296; 1 Hawk. P. C. 83.
[u] L. of N. b. 6, c. 2, § 12.
[w] See page 426.

(10) It would seem from Foster, 294, and 2 Ld. Raym. 1498, that the father only struck the child once and with a small cudgel; so that, as Mr. Justice Coleridge observes, the ground of this decision was the absence of any fact denoting malice, rather than indulgence shown to parental passion.

they are under peculiar restrictions: for[x] it is provided, that if any person sends any child under his government beyond the seas, either to prevent its good education in England, or in order to enter into or reside in any popish college, or to be instructed, persuaded, or strengthened in the popish religion; in such case, besides the disabilities incurred by the child so sent, the parent or person sending shall forfeit 100*l.*, which[y] shall go to the sole use and benefit of him that shall discover the offence. And[z] if any parent or other, shall send or convey any person beyond sea, to enter into, or be resident in, or trained up in any priory, abbey, nunnery, popish university, college, or school, or house of jesuits, or priests, or in any private popish family, in order to be instructed, persuaded, or confirmed in the popish religion; or shall contribute any thing towards their maintenance when abroad by any pretext whatever, the person both sending and sent shall be disabled to sue in law or equity, or to be executor or administrator to any person, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and [452] shall forfeit all his goods and chattels, and likewise all his real estate for life[11].

2. The *power* of parents over their children is derived from the former consideration, their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it. And upon this score the municipal laws of some nations have given a much larger authority to the parents than others. The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the

2. Power of parents over their legitimate children.

[x] Stat. 1 Jac. I. c. 4, and 3 Jac. I. c. 5. [y] Stat. 11 & 12 Wm. III. c. 4. [z] Stat. 3 Car. I. c. 2.

(11) These disabilities ceased by the operation of 31 Geo. 3, c. 32, see note to Co. Litt. 391, a. Mr. J. Coleridge, nevertheless, doubts whether that act had any such effect; Mr. Chambers, also, even after the Roman Catholic Relief Bill, (10 Geo. 4, c. 7,) considered the statutes in the text as still in force; see Chamb. on Inf. p. 121. These doubts, however, seem scarcely tenable since the passing of 2 & 3 Wm. 4, c. 115, which was intended to place Roman Catholics upon the same footing, with respect to their schools, chapels, charities, &c. as Protestant Dissenters; since which act it has been expressly held, that bequests for the promotion of that religion are lawful, 2 M. & K. 221, 684. See also the observations on the subject of these disabilities by Lord Eldon, (Jac. 264, n.), and Lord Cottenham, (4 M. & C. 687).

power of taking away [a]. But the rigour of these laws was softened by subsequent constitutions; so that [b] we find a father banished by the emperor Hadrian for killing his son, though he had committed a very heinous crime, upon this maxim, that "*patria potestas in pietate debet, non in atrocitate, consistere.*" But still they maintained to the last a very large and absolute authority: for a son could not acquire any property of his own during the life of his father; but all his acquisitions belonged to the father, or at least the profits of them for his life [c].

The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner [d]; for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age was also *directed* by our ancient law to be obtained: but it is now absolutely *necessary*; for without it the contract is void [e] [12]. And this also is another means, which the law has put into the parent's hands, in order the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons: and next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages. A father has no other power over his son's
[453] *estate*, than as his trustee or guardian; for though he may receive the profits during the child's minority, yet he must account for them when he comes of age [13]. He may indeed have the benefit of his children's labour while they live with him, and are maintained by him; but this is no more than he is entitled to from his apprentices or servants. The legal

[a] Ff. 28, 2, 11; Cod. 8, 47, 10.
[b] Ff. 48, 9, 5.
[c] Inst. 2, 9, 1.
[d] 1 Hawk. P. C. 130.
[e] Stat. 26 Geo. II. c. 33.

(12) But now only voidable; vide supra, p. 438, n. 12.

(13) And even before that time, if the infant by his next friend bring him to an account in the Court of Chancery, which court will not only protect the infant's property, but will manage and improve it for his benefit until he comes of age, and in some cases after that event, making allowances in the meantime, for education, maintenance, &c. in proportion to the annual income of the property. It must not be forgotten, however, that the costs of all proceedings incident to such a suit are defrayed out of the estate; see further on this subject, infra, p. 463, n. 13.

power of a father [14] (for a mother, as such, is entitled to no power, but only to reverence and respect [15]), the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established), when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives [16], this empire of the father continues even after his death; for he may by his will appoint a guardian to his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis* [17], and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

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(14) As to the mode by which a father may regain the custody of the person of his child by writ of habeas corpus, see the cases cited in 4 Ad. & El. 624; and as to the offence of child stealing, see 54 Geo. 3, c. 101.

(15) Until recently the mother might be excluded by the father from all access to her children; and though he did so avowedly for extortion or intimidation, every mother had failed in her attempt to induce the courts to relax this rule; see the cases cited in 4 Ad. & El. 624. Even the Court of Chancery never interfered with the legal right of the father to absolute dominion over his infant children, being wards of court, unless upon distinct proof that the father was of immoral and irreligious principles and that his children were likely to be corrupted by him; see 10 Ves. 58; Jac. 264, n.; 2 Russ. 1; 2 Sim. 35. But now by 2 & 3 Vict. c. 54, a mother (unless an adulteress), may by petition to the Lord Chancellor or Master of the Rolls, obtain an order for access to her infant children, but at such times only and subject to such regulations as the court shall think proper; and if such infant or infants shall be within the age of seven years, the mother may obtain an order that they shall be delivered to and remain in her custody until attaining such age, subject to such regulations as aforesaid; see 10 Sim. 291; 11 Sim. 178.

(16) Unless the father, by consenting to his child's marriage previously to attaining that age, has impliedly emancipated him.

(17) This phrase, now in universal use, is not confined to a person having the authority of a parent over a child, but is applicable to every person "meaning to adopt any of the parental duties and offices towards a child," without being the actual parent. The adoption of this character by a testator is always a question of great importance, as many nice and important distinctions exist in the doctrines of ademption of legacies, maintenance, &c., between cases where the testator is in *loco parentis* to the legatee, and cases where he is not; see 2 K. 598; 3 M. & C. 366; 5 M. & C. 35.

3. Duties of children.

3. The *duties* of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after: they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they, who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws. And the Athenian laws[f] carried this principle into practice with a scrupulous kind of nicety; obliging all children to provide for their father, when fallen into poverty; with an exception to spurious children, to those whose chastity has been prostituted by consent of the father, and to those whom he had not put in
[454] any way of gaining a livelihood. The legislature, says Baron Montesquieu[g], considered, that in the first case the father, being uncertain, had rendered the natural obligation precarious; that in the second case, he had sullied the life he had given, and done his children the greatest of injuries, in depriving them of their reputation; and that in the third case he had rendered their life (so far as in him lay) an insupportable burthen, by furnishing them with no means of subsistence.

Our laws agree with those of Athens with regard to the first only of these particulars, the case of spurious issue. In the other cases the law does not hold the tie of nature to be dissolved by any misbehaviour of the parent; and therefore a child is equally justifiable in defending the person, or maintaining the cause or suit of a bad parent, as a good one; and is equally compellable[h], if of sufficient ability, to maintain and provide for a wicked and unnatural progenitor, as for one who has shewn the greatest tenderness and parental piety[18].

[f] Potter's Antiq. b. 4, c. 15. [g] Sp. L. b. 26, c. 5.
[h] Stat. 43 Eliz. c. 2.

(18) A liability which may also be enforced under sects. 56, 78, of the Poor-Law Amendment Act.

II. We are next to consider the case of illegitimate children, or bastards; with regard to whom let us inquire, 1. Who are bastards. 2. The legal duties of the parents towards a bastard child. 3. The rights and incapacities attending such bastard children. II. Illegitimate children.

1. Who are bastards. A bastard, by our English laws, is one that is not only begotten, but born, out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry [1]: and herein they differ most materially from our law; which, though not so strict as to require that the child shall be *begotten*, yet makes it an indispensable condition, to make it legitimate, that it shall be *born*, after lawful wedlock. And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage taken in a civil light; abstractedly from any religious view, which has nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage therefore being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong: this end is undoubtedly better answered by legitimating all issue born after wedlock, than by legitimating all issue of the same parties, even born before wedlock, so as wedlock afterwards ensues; 1. Because of the very great uncertainty there will generally be in the proof that the issue was generally begotten by the same man; whereas by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly certain what child is legitimate, and who is to take care of the child. 2. Because by the Roman law a child may be continued a bastard, or made legitimate, at the option of the father and mother by a marriage *ex post facto;* thereby opening a door to many frauds and partialities which by our law are prevented. 3. Because by those laws a man may remain a bastard till forty years of age, and then become legitimate by the subsequent marriage of his parents; whereby the main end of marriage, the protection of infants, is totally frustrated. 4. Because this rule of the Roman law admits of no limitations as to the time or number of bastards so to be legitimated; but a dozen of 1. Who are bastards. [455]

[1] Inst. 1, 10, 13; Decret. l. 4, t. 17, c. 1.

them may, twenty years after their birth, by the subsequent marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial state; to which one main inducement is usually not only the desire of having *children*, but also the desire of procreating lawful *heirs*. Whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature. For, if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence, by marrying within a few months after, our law is so indulgent as not to bastardize the child, if it be born, though not begotten in lawful wedlock; for this is an incident that can happen but once, since all future children will be begotten, [456] as well as born, within the rules of honour and civil society. Upon reasons like these we may suppose the peers to have acted at the parliament of Merton, when they refused to enact that children before marriage should be esteemed legitimate [k].

From what has been said it appears, that all children born before matrimony are bastards by our law: and so it is of all children born so long after the death of the husband, that by the usual course of gestation [19], they could not be begotten by him. But this being a matter of some uncertainty, the law is not exact as to a few days [l]. And this gives occasion to a proceeding at common law, where a widow is suspected to feign herself with child, in order to produce a supposititious

[k] *Rogaverunt omnes episcopi magnates, ut consentirent quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quia ecclesia tales habet pro legitimis. Et omnes comites et barones una voce respondederunt quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.* Stat. 20 Hen. III. c. 9. See the introduction to the great charter, edit. Oxon. 1759, *sub anno* 1253.

[l] Cro. Jac. 541.

(19) In Co. Lit. 123, b., it is laid down as a positive rule, that the extreme period of gestation is forty weeks. But it has been now long settled, that our law has not authoritatively established any fixed period for gestation, but that the legitimacy or illegitimacy of a party is always a question of fact, to be decided in each particular case by the jury, who may, however, receive the testimony of persons of medical experience as to the course of nature on this subject, as in the *Gardner Peerage case*, reported by Le Marchant. The Code Civile, however, has fixed the period of three hundred and ten days, as a limit to our credulity respecting retarded births; see l. 1, tit. vii.

heir to the estate: an attempt which the rigour of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death [m]. In this case with us the heir presumptive [20] may have a writ *de ventre inspiciendo*, to examine whether she be with child or not [n]; and, if she be, to keep her under proper restraint, till delivered; which is entirely conformable to the practice of the civil law [o]: but if the widow be upon due examination found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within forty weeks from the death of a husband [p]. But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband; in this case he is said to be more than ordinarily legitimate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases [q]. To prevent this, among other inconveniences, the civil law ordained that no widow should marry *infra annum luctus* [r], a rule which obtained so early as [457] the reign of Augustus [s], if not of Romulus; and the same constitution was probably handed down to our early ancestors from the Romans, during their stay in this island; for we find it established under the Saxon and Danish governments [t].

As bastards may be born before the coverture or marriage state is begun, or after it is determined, so also children born during wedlock may in some circumstances be bastards. As if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, *extra quatuor maria*), for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards [v]. But, generally during the coverture, access of the husband shall be

[m] Stiernhook de jure Gothor. l. 3, c. 5.
[n] Co. Litt. 8; Bract. l. 2, c. 32.
[o] Ff. 25, tit. 4, *per tot.*
[p] Britton, c. 66, page 166.
[q] Co. Litt. 8.
[r] Cod. 5, 9, 2.
[s] But the year was then only *ten* months. Ovid. Fast. l. 27.
[t] *Sit omnis vidua sine marito duodecim menses.* LL. Ethelr. A.D. 1008. LL. Canut. c. 71.
[v] Co. Litt. 244.

(20) Or a devisee over on failure of issue, 4 B. C. C. 90; see also 2 P. Wms. 591 and Co. Lit. by Harg. 8, b. n. 3; 123, b. n. 1.

presumed, unless the contrary can be shewn [u]; which is such a negative as can only be proved by shewing him to be elsewhere: for the general rule is *præsumiter pro legitimatione* [w] [21]. In a divorce *a mensa et thoro*, if the wife breeds children they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved: but in a voluntary separation by agreement, the law will suppose access, unless the negative be shewn [x]. So also if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastards [y]. Likewise in case of divorce in the spiritual court *a vinculo matrimonii*, all the issue born during the coverture are bastards [z]; because such divorce is always upon some cause, that rendered the marriage unlawful and null from the beginning.

2. Duties of parents to their bastards.

2. Let us next see the duty of parents to their bastard children by our law; which is principally that of maintenance. For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved: and they hold indeed as to many other intentions; as particularly, that a man shall not marry his bastard sister or daughter [a]. The civil law, there-

[458]

[u] Salk. 123; 3 P. Wms. 276; Stra. 925.
[w] 5 Rep. 98.
[x] Salk. 123.
[y] Co. Litt. 244.
[z] Ibid. 235.
[a] Lord Raym. 68; Comb. 356.

(21) Lord Coke's rule, Co. Lit. 244, a., that the legitimacy cannot be disputed unless the husband were *extra quatuor maria*, has been long denied; see 2 Str. 925; 4 T. R. 251, 356.

In *King* v. *Luffe*, (8 E. 93), it was laid down that where the evidence established a "natural impossibility" that the husband could be the father the child is a bastard; the court remarking that the case where the child is born so recently after the marriage of the parents, that it could not have been begotten in wedlock rests on its own peculiar grounds, such a child being legitimated by the recognition of the husband. So also in *Morris* v. *Davis*, 3 Car. & P. 218, 427, it was decided, that although access of the husband will still be presumed; yet to rebut this presumption, it is not essential to show a physical impossibility of access either by absence of the husband *extra quatuor maria*, or any other circumstance; but the presumption will be repelled by any facts which prove to the satisfaction of the jury, that no opportunity for sexual intercourse between the husband and wife existed, within the possible limits of the epoch of conception; see also the *Gardner Peerage case*, reported by Le Marchant, the *Banbury Peerage case*, Sir Harris Nicholas on Adulterine Bastardy; *Head* v. *Head*, 1 T. & R. 138; *Bury* v. *Philpot*, 2 M. & K. 349.

fore, when it denied maintenance to bastards begotten under certain atrocious circumstances[b], was neither consonant to nature nor reason; however profligate and wicked the parents might justly be esteemed.

The method in which the English law provides maintenance for them is as follows[c]. When a woman is delivered, or declares herself with child, of a bastard, and will by oath before a justice of peace charge any person as having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter sessions to dispute and try the fact. But if the woman dies, or is married before delivery, or miscarries, or proves not to have been with child, the person shall be discharged: otherwise the sessions, or two justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging the mother or the reputed father with the payment of money or other sustentation for that purpose. And if such putative father, or lewd mother, run away from the parish, the overseers, by direction of two justices, may seize their rents, goods, and chattels, in order to bring up the said bastard child. Yet such is the humanity of our laws, that no woman can be compulsively questioned concerning the father of her child, till one month after her delivery: which indulgence is however very frequently a hardship upon parishes, by giving the parents opportunity to escape[22].

[b] Nov. 89, c. 15.
[c] Stat. 18 Eliz. c. 3; 7 Jac. I. c. 4; 3 Car. I. c. 4; 13 & 14 Car. II. c. 12; 6 Geo. II. c. 31.

(22) So much of these and other statutes as relate to the liability and punishment of the putative father and the punishment of the mother of bastard children were repealed by sect. 89 of the Poor-Law Amendment Act, (4 & 5 Wm. 4, c. 76); by sect. 71, of which act it was enacted, that the mother of every child, born a bastard after the passing of the act, should be liable to maintain such child as part of her family, until it attain sixteen years of age, or being a female marry; but if such mother should subsequently marry, then her liability is by sect. 57, transferred to her husband. But by sect. 72, if such child shall become chargeable to the parish, the guardians of the poor or the overseers (where no guardians are appointed, 2 & 3 Vict. c. 85), may, within three months' after such chargeability, apply to any special or petty sessions, for an order on the putative father, and the court may make such order on the testimony of the mother, if corroborated by other evidence; but such order shall in no case continue in force after the child shall have attained seven years of age; see also ss. 73—76, and 78. By

3. Rights and incapabilities of bastards.

3. I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can *acquire;* for he can *inherit* nothing, being looked upon as the son of nobody; and sometimes called *filius nullius,* sometimes *filius populi* [d]. Yet he may gain a [459] surname by reputation [e], though he has none by inheritance. All other children have their primary settlement in their father's parish; but a bastard in the parish where born [23], for he hath no father [f]. However, in case of fraud, as if a woman be sent either by order of justices, or comes to beg as a vagrant, to a parish which she does not belong to, and drops her bastard there; the bastard shall, in the first case, be settled in the parish from whence she was illegally removed [g]; or, in the latter case, in the mother's own parish, if the mother be apprehended for her vagrancy [h]. Bastards also born in any licensed hospital for pregnant women, are settled in the parishes to which the mothers belong [i]. The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius,* he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. A bastard was also, in strictness, incapable of holy orders; and though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church [k]; but this doctrine seems now obsolete; and in all other respects there is no distinction between a bastard and another man [24]. And really any other distinction but

[d] Fort. de LL. c. 40.
[e] Co. Litt. 3.
[f] Salk. 427.
[g] Salk. 121.
[h] Stat. 17 Geo. II. c. 5.
[i] Stat. 13 Geo. III. c. 82.
[k] Fortesc. c. 40; 5 Rep. 58.

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2 & 3 Vict. c. 85, s. 3, the putative father may, by entering into recognizances to appear at and abide by the judgment of quarter sessions, transfer the case from the petty to the quarter sessions; see further 1 M. & W. 129; 1 Tyr. & Gr. 358; 7 A. & E. 819.

(23) But now by sect. 71, of the Poor-Law Amendment Act, (4 & 5 Wm. 4, c. 76), every bastard born after the passing of that act shall have and follow the settlement of its mother.

(24) This observation is not quite correct, for the law makes many other distinctions than those in the text between bastards and others. Thus, his father's natural affection is not sufficient to support an use to him; see Dyer, 374; Co. Lit. 133, a. So equity will supply a defect in a surrender of a copyhold (2 Ves. 332); or in the execution of a power (Sugd. Pow. ii. 100), in

that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parent's crimes, be odious, unjust, and cruel to the last degree: and yet the civil law, so boasted of for its equitable decisions, made bastards in some cases incapable even of a gift from their parents[l]. A bastard may, lastly, be made legitimate, and capable of inheriting by the transcendent power of an act of parliament, and not otherwise[m]; as was done in the case of John of Gant's bastard children, by a statute of Richard the Second.

[l] Cod. 6, 57, 5.

[m] 4 Inst. 36.

favour of a legitimate, but not in favour of an illegitimate child; nor will the latter ever be entitled under the description "children" in a will unless the words be otherwise senseless; see the cases cited, 1 V. & B. 452. And where by apt words their parent has provided for them in his will, such benefit is taxed by a legacy duty of ten per cent., while a legacy to a legitimate child only pays one per cent. The custody of the person of a bastard infant belongs to the mother, at least as against the father; see 5 E. 221; 7 E. 579; 1 B. & P. N. R. 148. With regard to the marriage of bastards, the law considers their actual parents so far as to prevent an illegitimate child from marrying a relation within the Levitical degrees, (Ld. Raym. 68; Comb. 356; 1 T. R. 96), but does not require the consent of parents, (but of guardians appointed specially for that purpose by the Court of Chancery), to the validity of the marriage; see 11 E. 1.

CHAPTER XVII.

OF GUARDIAN AND WARD.

Guardian and ward.

THE only general private relation now remaining to be discussed, is that of guardian and ward; which bears a very near resemblance to the last, and is plainly derived out of it: the guardian being only a temporary parent, that is for so long a time as the ward is an infant, or under age. In examining this species of relationship, I shall first consider the different kinds of guardians, how they are appointed, and their power and duty; next, the different ages of persons, as defined by the law: and, lastly, the privileges and disabilities of an infant, or one under age and subject to guardianship.

1. Different kinds of guardians;

The guardian with us performs the office both of the *tutor* and *curator* of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune; or, according to the language of the court of chancery, the *tutor* was the committee of the person, the *curator* the committee of the estate. But this office was frequently united in the civil law[a]; as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct.

by nature,

[461]

Of the several species of guardians, the first are guardians *by nature*[1]; viz. the father and (in some cases) the mother of the child. For, if an estate be left to an infant, the father is

[a] Ff. 26, 4, 1.

(1) This guardianship confers no right to intermeddle with the property of the infant; but is a mere personal right in the father or other ancestor to the custody of the person of his heir apparent or presumptive, until attaining twenty-one years of age; see 5 Mod. 224; Co. Lit. 88, n. 63—71. As to the question whether this guardianship now in strictness exists; see McPherson on Infants, p. 58. By the operation of 3 & 4 Wm. 4, c. 106, their number has been much diminished; see Chambers on Infancy, p. 63.

by common law the guardian, and must account to his child for the profits[b]. And with regard to daughters, it seems by the construction of the statute 4 & 5 Ph. & Mar. c. 8[2], that the father might by deed or will assign a guardian to any woman-child under the age of sixteen; and, if none be so assigned, the mother shall in this case be guardian[c]. There are also guardians *for nurture*[d3]; which are, of course, the father or mother, till the infant attains the age of fourteen years[e]: and in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education[f4]. Next are guardians *in socage* (an appellation which will be fully explained in the second book of these Commentaries), who are also called guardians *by the common law*[5]. for nurture, in socage.

[b] Co. Litt. 88.
[c] 3 Rep. 39.
[d] Co. Litt. 88.
[e] Moor. 738; 3 Rep. 38.
[f] 2 Jones, 90; 2 Lev. 163.

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(2) This statute was repealed by 9 Geo. 4, c. 31, s. 1.

(3) This guardianship, like that by nature, has no reference to the property of the child; it ends when the infant attains the age of fourteen years, being merely a personal right belonging to the father, or, if he be dead, to the mother, but (it seems) to no other person: Burr. Set. Ca. 149; Str. 1131; *Sed vide*, 3 Com. Dig. 421. It can only be in the mother, where the infant's father has died without appointing another person as testamentary guardian, and the Court of Chancery has not thought fit to interfere with the mother's natural right; see 2 Swanst. 336; S. C. 2 Atk. 14; 3 Atk. 624; 1 Ves. 91.

It has been recently (11th Nov. 1843) decided by the court of Queen's Bench on a review of all the authorities, that a pauper child, under seven years of age, having no father and a settlement different from its mother's, cannot be separated from her by an order of removal, although such order be consented to by the mother; for the rule of law which gives the mother the custody of the person as against all the world but the father, is for the benefit of the child; see 7 Jur. 1011.

(4) In 4 Burr. 1436, Lord Mansfield considered the power of the Ecclesiastical Court as extending only to appoint a guardian *ad litem*; see also Lord Hardwicke's observations in 3 Atk. 631. The right seems to be claimed only in the absence of all other guardianship by tenure or otherwise, and to apply only to the grant of letters of administration of the personal estate during the minority of the person, who would, if of full age, be entitled to such grant; see 2 Cas. temp. Lee, 131; 5 A. & E. 441, and infra, p. 463, n. 15.

(5) A socage guardianship arises where a title to the legal estate in socage lands has descended on an infant under fourteen years of age; see 2 Mod. 176. It does not arise where the title is merely to the equitable in-

These take place only when the minor is entitled to some estate in lands, and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend: as, where the estate descended from his father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian[g]. For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust[h]. The Roman laws proceed on a quite contrary principle, committing the care of the minor to him who is the next to succeed in the inheritance, presuming that the next heir would take the best care of an estate to which he has a prospect of succeeding: and this they boast
[462] to be "*summa providentia*[i]." But in the mean time they seem to have forgotten, how much it is the guardian's interest to remove the incumbrance of his pupil's life from that estate for which he is supposed to have so great a regard[k]. And this affords Fortescue[l], and sir Edward Coke[m], an ample opportunity for triumph; they affirming, that to commit the custody of an infant to him that is the next in succession is

[g] Litt. § 123.

[h] *Nunquam custodia alicujus de jure alicui remanet, de quo habeatur suspicio, quod possit vel velit aliquod jus in ipsa hæreditate clamare.* Glanv. l. 7, c. 11.

[i] Ff. 26, 4, 1.

[k] The Roman satyrist was fully aware of this danger, when he puts this private prayer into the mouth of a selfish guardian:

—*pupillum o utinam, quem proximus hæres*
Impello, expungam. Pers. 1, 12.

[l] c. 44.

[m] 1 Inst. 88.

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terest (1 B. & Ald. 560), and for this reason, that the office of this guardian being to perform the tenant's services to the lord and to instruct the heir in his duties as a socage tenant, the lord could claim neither rent nor service from a mere *cestui que trust*. According to Lord Coke (Co. Lit. 88 b.), the next of kin to the heir cannot be guardian in socage if the inheritance can by any possibility descend to himself; see 10 E. 491; 3 Wils. 516; 7 T. R. 386. This guardian acquires, by virtue of his office, an actual estate in the land, (Plowd. 293; 3 A. & E. 597), if he resided within the parish for forty days, gained a settlement, (10 E. 491; 5 M. & S. 510); and can also grant leases of the lands, but only until the infant attains fourteen years of age, (1 Ld. Raym. 131), at which epoch such leases become absolutely void, and not merely voidable; MacPher. on Inf. p. 36.

"*quasi agnum committere lupo, ad devorandum*[n]." These guardians in socage, like those for nurture, continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian. This he may do unless one be appointed by the father, by virtue of the statute 12 Car. II. c. 24, which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship *in chivalry* (which lasted till the age of twenty-one, and of which we shall speak hereafter) enacts, that any father[6], under age or of full age, may by deed[7] or will[8] dispose of the custody of his child, either born or unborn, to any person, except a popish recusant[9], either in possession or reversion, till such child attains the age of one-and-twenty years[10]. These are called guardians, by *statute* or *testamentary* guardians. There are also special guardians, *by custom* of London, and other places[o11]; by statute.

[n] See Stat. Hibern. 14 Hen. III. This policy of our English law is warranted by the wise institutions of Solon, who provided that no one should be another's guardian, who was to enjoy the estate after his death. (Potter's Antiq. b. 1, c. 26). And Charondas, another of the Grecian legislators, directed that the inheritance should go to the father's relations, but the education of the child to the mother's; that the guardianship and right of succession might always be kept distinct. (Petit. Legg. At. l. 6, t. 7).

[o] Co. Litt. 88.

(6) A Jew may appoint a guardian under this act, (2 Swanst. 538), but a mother cannot, (Vaughan, 180; 3 Atk. 519); nor a putative father, nor a person *in loco parentis*; though the Court of Chancery in the exercise of its general jurisdiction over infants, upon which see note 13, infra, p. 463, will pay great attention to nominations of guardians by such testators; see 2 Cox, 46; 2 B. C. C. 583; 1 J. & W. 106.

(7) That is, by a testamentary instrument in the form of a deed; see 7 Ves. 367; for such instrument can have no operation until the death of the appointor and is revocable at pleasure; see Finch, 328.

(8) Which operates solely by the statute and therefore needs no probate; see 3 Phill. 222, and infra, p. 466, n. 23.

(9) See also 25 Car. 2, c. 2, s. 25. But since 31 Geo. 3, c. 32, this disqualification has ceased; vide supra, p. 452, n. 11. The Court of Chancery now feels no hesitation in recognizing a Roman Catholic priest as a testamentary guardian; see 4 M. & C. 687.

(10) Or for any less time; and for such period the testamentary guardian is invested by the statute with the same office, estate, rights, duties, and liabilities as the guardian in socage; see 9 Mod. 135; 4 B. P. C. 306; 2 P. Wms. 106; 2 Wils. 129.

(11) As of the county of Kent, when a tenant in gavelkind dies leaving his

but they are particular exceptions, and do not fall under the general law[12].

Power and duties of guardian and ward.

The power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a father and child; and therefore I shall not repeat them; but shall only add, that the guardian, when the ward comes of age, is bound to give
[463] him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. In order therefore to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court. For the lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns. In case, therefore, any guardian abuses his trust, the court will check

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heir or heirs within the age of fifteen years, (Bac. Abr. A. 2; Robinson on Gavelkind, p. 237—247); and of many manors, (Watkins on Copyholds, p. 96, 110, 415; 3 Lev. 395; 2 M. & S. 504; 11 Geo. 4, and 1 Wm. 4, c. 65, ss. 3—10). The guardianship, which belonged for many ages to the mayor and aldermen of the city of London in their court of orphans, seems to have fallen into nearly total disuse; see 2 Bl. N. S. 131, and for an outline of its peculiarities, see Chamb. on Inf. ch. iii. s. 3; MacPher. on Inf. p. 48.

(12) Besides the above species of guardians may be mentioned "*guardians by appointment of the Court of Chancery*," upon which, see next note:—"*Guardians by election of the infant*" on attaining fourteen, when guardianship by socage ceased, though their office seems not to extend beyond giving the consent to marriage required by the Marriage Act, nor does the infant's election in any case supersede the jurisdiction of the Court of Chancery; see 4 Mad. 462, and the recent case of *Coham* v. *Coham*, 8 Jur. 26 (Dec. 22, 1843):—"*Guardians ad litem*," whose office relates, in strictness, neither to the person nor property of the infant, but merely to his interest in the suit in which such appointment takes place; see 8 M. & W. 660:—"*Guardian of the Royal Family*," an office which owes its recognition by our statute to the circumstances mentioned supra, p. 225, and belonging to the reigning sovereign and extending to the education, custody of the person, and approbation of the marriages of all members of the royal family, other than princes or princesses married into foreign families; but which has been recently suspended in favour of his Royal Highness Prince Albert, so far as regards the children of her present Majesty by him; see 3 & 4 Vict. c. 52, supra, p. 224, n. 5:—and lastly, "*Guardians of the poor*," whose title to the name rests on the Poor-Law Amendment Act.

and punish him; nay sometimes will proceed to the removal of him, and appoint another in his stead[p 13].

[p] 1 Sid. 424; 1 P. Wms. 703.

(13) Whatever may have been the origin of the jurisdiction of the Court of Chancery over infants, (which has been the subject of much controversy; see Harg. Co. Lit. 88 b., n. 16; Story, Eq. Jur. ii. 516; Chamb. on Inf. Introd. McPher. on Inf. ch. xi), the necessity of some such provision for the protection of infants, especially orphans, must be apparent from the peculiar nature and restrictions of the other guardianships. Since the abolition of guardianship in chivalry (12 Car. 2, c. 24), the next of kin is usually unable to act as guardian in socage, either because the land has been devised away from the infant, or because the infant's property is personalty. An infant orphan, whose father has failed to appoint a guardian under the statute of Car. 2, would be, therefore, absolutely without protection either of person or property, unless the jurisdiction of the sovereign as *parens patriæ*, the protector of all who cannot protect themselves, were called into action. By analogy to the case of idiots and lunatics, though not under the statute (Prerog. Reg. cap. 10), the exercise of this jurisdiction belongs to the Court of Chancery, (4 Rep. 127 a.; 10 Ves. 52; 2 Sch. & Lef. 436), except where restricted or affected by statute. And it is a rule of court that a mere stranger may, by filing a bill, at any time set the machinery of the court in motion for the protection of any infant possessed of or entitled to property, as by so doing such infant becomes a "ward of court." The possession of property is essential, not from any want of jurisdiction in its absence, but from a want of means (and it may be added of necessity) to exercise jurisdiction; see 2 Russ. 21. At any rate with the single exception of a petition under the Marriage Act, for a guardian to give the consent required by law to the marriage of an infant, the Court of Chancery seems never to have exercised its jurisdiction, unless the infant had property. And, first, with regard to the persons of infants, the court having appointed a guardian of the person of the ward, either by its own authority or by recognizing the testamentary or other guardians already lawfully appointed; proceeds to control and guide them in the exercise of their legal power over the person of the ward; prescribes its residence so that it may be kept within the jurisdiction; settles a scheme for its education, fixing even the place and mode of, and the allowance for its education; regulates its choice of a profession or trade, and in marriage; and performs all the other duties of the guardians by nature and for nurture. On the other hand, with respect to the property of wards of court, the court not only superintends its management but improves it, directs a proper settlement on their marriages, &c. This twofold protection of the court is granted even to infants in the womb, is not entirely removed upon attaining twenty-one years of age, especially with regard to that most important part of its jurisdiction, viz. over the marriages of female wards of court. In these and many other respects, guardians by appointment of the Court of Chancery have powers far superior to those of any other guardians. Guardians appointed by the court, receivers, &c. are also compelled to the due performance of their respective duties by bonds, recognizances, undertakings, and the infant is further protected from injury by these or any other parties by the process of contempt. The jurisdiction of the court being independent of feudal tenures, construction of statutes, and all technical rules, and dependent only on the dis-

2. Ages of persons for whom guardians are appointed.

2. Let us next consider the ward or person within age, for whose assistance and support these guardians are constituted by law; or who it is, that is said to be within age. The ages of male and female are different for different purposes. A male at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate[14], at *seventeen* may be an executor[15]; and at *twenty-one* is at his own disposal, and may aliene his lands, goods, and chattels[16]. A female also at *seven* years of age

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cretion of the chancellor, is far more capable of adaptation to the various grades of society, the intentions of testators, the wants and wishes of the infants themselves, and the different varieties of property, than all the other guardianships combined; and the only thing to be lamented is, that the expenses attending the exercise of the jurisdiction are so great.

With regard to infants without property, the jurisdiction of the Court of Chancery is not lost, but merely inactive, because personal guardianship is only necessary; and this the law has more efficiently provided for them, not merely by the writ of habeas corpus, but by various special statutory enactments; as the acts relating to the poor; those relating to parish and other apprentices; the acts regulating the nature of the employment of infants, as the Chimney Sweepers' Acts, (4 & 5 Wm. 4, c. 35; 3 & 4 Vict. c. 85), the Factories Acts, (42 Geo. 3, c. 73; 3 & 4 Wm. 4, c. 103, amended by 4 & 5 Wm. 4, c. 1), the Mines and Collieries Act, (5 & 6 Vict. c. 99); the act 9 Geo. 4, c. 31, whereby concealing the birth of a child is made a misdemeanor, stealing any child under ten years of age a felony, and punishable with transportation for seven years, and the acts relating to injuries of the persons of female infants, &c.

In conclusion, it may be observed, that by a recent statute (3 & 4 Vict. c. 90), the Court of Chancery is empowered to remove infants convicted of felony from the custody of their parents or guardians, and to appoint some other person to take charge of them, their maintenance and education.

(14) But now by sect. 7, of 7 Wm. 4, and 1 Vict. c. 26, it is enacted, that no will made before the 1st of January, 1838, by any person under the age of twenty-one years shall be valid.

(15) An infant may be appointed executor how young soever he be and even though *in ventre sa mere*. But if an infant be appointed sole executor, he is by stat. 38 Geo. 3, c. 87, s. 6, altogether disqualified from exercising his office during his minority, and administration *cum testamento annexo*, will be granted to the guardian of such infant or to such other person as the spiritual court shall think fit, until such infant shall have attained the age of twenty-one years. See further as to infant executors and administrators, Williams on Executors, Pt. 1, Bk. 5, c. 3, s. 3.

(16) Even to property, as to which the donor may have expressly directed that the interest of the child should not vest, or that he should not have full possession or power to aliene, until attaining some greater age than twenty-one; a direction which some parents

may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may consent or disagree to marriage; and, if proved to have sufficient discretion, may bequeath her personal estate; at *fourteen* is at years of legal discretion, and may choose a guardian; at *seventeen* may be executrix; and at *twenty-one* may dispose of herself and her lands. So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth[q17]; who till that

[q] Salk. 44, 625; Lord Raym. 480, 1096; Toder v. Sansam, Dom. Proc. 27 Feb. 1775.

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and benefactors are very prone to append to their gift, but which, unless followed by a gift over on alienation by the donee, before attaining such age, becomes wholly inoperative to prevent alienation by the infant immediately on attaining twenty-one; and, as Mr. Christian well observes, "probably upon much more injurious terms than if he were in possession."

(17) This is founded on the rule that the law in computation of time allows no fractions of a day; see Co. Lit. 135; 5 Rep. p. 2; infra, vol. ii. p. 141. Sir Harris Nicholas, however, remarks, that it is evident from Fœdera, (Allen's edition), vol. i. part ii. p. 762, (the record of the surrender of Scotland by Baliol), that what occurred in the earlier part of the 20th of November, is said to be in the end of the twentieth year of the reign of King Edward I, while what occurred in the later part of the day is said to be in the end of the 20th *and beginning of the* 21*st*, and the Red-Book of Exchequer agrees herewith. In the computation of time between two given days, the general rule is, that one day is to be included, and the other excluded; see 1 My. & Cr. 50; and 4 B. & Ad. 255. The recent case of *Gorst* v. *Lowndes*, 5 Jur. 457; Sim. 434, is a curious instance of the application of this rule. A testator directed his trustees to accumulate the income of all his property at compound interest for the term of twenty-one years from his decease, and at the end of that term to convey the same to certain persons for life and then over. He died on the 5th of January, 1820, at half-past two o'clock, P.M. The clear residue of his personal estate, and the income of his real estates, and of the accumulations thereof, up to the 4th of January, 1841, consisted, besides certain other sums of stock, of 184,984*l.* consols, one half year's dividend upon which, amounting to 2774*l.*, and accruing due on the 5th of January, 1841, was claimed by the first tenant for life under the will, who submitted that the term of twenty-one years or period of accumulation was to be completed in the same way as the period of minority; where, if a child was born on the 5th of January, 1820, it would be of age on the 4th of January, 1841, consequently that the term of twenty-one years expired on the 4th of January, 1841. On the other hand, the persons beneficially interested in the capital of the accumulations contended that the said dividends ought to be added to the capital on the ground that the accumulation was directed by the testator and perfectly valid under the Thellusson Act until the end of the twenty-first anniversary of the day of the death of the testator; in fact, that that day was to be reckoned in his life, and

time is an infant, and so styled in law. Among the ancient
[464] Greeks and Romans *women* were never of age, but subject to perpetual guardianship[r], unless when married, "*nisi convenissent in manum viri*:" and, when that perpetual tutelage wore away in process of time, we find that, in females as well as males, full age was not till twenty-five years[s]. Thus by the constitution of different kingdoms, this period, which is merely arbitrary, and *juris positivi*, is fixed at different times. Scotland agrees with England in this point (both probably copying from the old Saxon constitutions on the continent, which extended the age of minority "*ad annum vigesimum primum, et eo usque juvenes sub tutelam reponunt*[t]);" but in Naples they are of full age at *eighteen*; in France, with regard to marriage, not till *thirty*: and in Holland at *twenty-five*.

3. Privileges and disabilities of infants.

3. Infants have various privileges, and various disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks as well by law as otherwise[u]; but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause; and it frequently happens, that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian. In criminal cases, an infant of the age of *fourteen* years may be capitally punished for any capital offence[w]; but under the age of *seven* he cannot. The period between *seven* and *fourteen* is subject to much uncertainty: for the infant shall, generally speaking, be judged *prima facie* innocent: yet if he was *doli capax*, and could discern between good and evil

[r] Pott. Antiq. b. 4, c. 11; Cic. pro Muren. 12.

[s] Inst. 1, 23, 1.

[t] Stiernhook. de jure Sueonum, l. 2, c. 2. This is also the period when the king, as well as the subject, arrives at full age in modern Sweden. Mod. Un. Hist. xxxiii. 220.

[u] Co. Litt. 135.

[w] 1 Hal. P. C. 25.

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not in the said term, which did not commence until the first moment of the 6th of January, 1820. His Honor decided in favour of the parties last mentioned; from which decision it seems to follow, that a man is to be considered in law as alive to the last hour of the day on which he dies.

at the time of the offence committed, he may be convicted, and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion [x]. And [465] sir Matthew Hale gives us two instances; one of a girl of thirteen, who was burned for killing her mistress; another of a boy still younger, that had killed his companion and hid himself, who was hanged; for it appeared by his hiding that he knew he had done wrong, and could discern between good and evil: and in such cases the maxim of law is, that *malitia supplet ætatem.* So also, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges [y].

With regard to estates and civil property, an infant hath many privileges, which will be better understood when we come to treat more particularly of those matters; but this may be said in general, that an infant shall lose nothing by non-claim, or neglect of demanding his right; nor shall any other *laches* or negligence be imputed to an infant, except in some very particular cases [18].

It is generally true, that an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him [19]. But still to all these rules there are some exceptions: part of which were just now mentioned in reckoning up the different capacities which they assume at different ages: and there are others, a

[x] 1 Hal. P. C. 26. [y] Foster, 72.

(18) This exemption does not seem to extend beyond the privilege conferred upon infants, that they shall lose nothing by non-claim or neglect to demand their rights during the minority; but be allowed, (like lunatics, persons beyond the seas, &c.), a certain period after becoming *sui juris*, in which to bring forward their claims; see 21 Jac. 1, c. 16, s. 7; 3 & 4 Wm. 4, c. 27, ss. 16—18; 3 & 4 Wm. 4, c. 42, s. 4.

(19) The privilege of infancy is a personal privilege, it can be pleaded by the infant alone or his representatives, (2 H. Bl. 515), consequently so far as the contract affects other parties, and so far as other parties are bound by it, it is good and valid, and they may be sued by the infant or others for a breach of it; as in actions on bills of exchange (4 Esp. 187); contracts for purchase or sale of goods (2 M. & S. 205); or other trading contracts (6 Taunt. 118), and as already observed in case of contracts of marriage, supra, p. 436, n. 7. There is only one exception to this rule, viz., in the case of a submission to arbitration, the essence of which is, that to be binding on either party it must be so on both; see 6 B. & C. 255.

few of which it may not be improper to recite, as a general specimen of the whole. And, first, it is true, that infants cannot aliene their estates: but infant trustees, or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint [z] [20]. Also it is generally true, that an infant can do no legal act: yet an infant, who has an advowson, may present to the benefice when it becomes void [a]. For the law in this case dispenses with one rule, in order to maintain
[466] others of far greater consequence: it permits an infant to present a clerk (who, if unfit, may be rejected by the bishop) rather than either suffer the church to be unserved till he comes of age, or permit the infant to be debarred of his right by lapse to the bishop [21]. An infant may also purchase lands, but his purchase is incomplete: for when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement [b]. It is, farther, generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable; yet in some cases [c] he may bind himself apprentice by deed indented or indentures for seven years [22]; and [d] he may by deed or will [23] appoint a guardian to his children, if he has any [24]. Lastly, it is generally true, that an infant can

[z] Stat. 7 Ann. c. 19; 4 Geo. III. c. 16.
[a] Co. Litt. 172.
[b] Co. Litt. 2.
[c] Stat. 5 Eliz. c. 4; 43 Eliz. c. 2; Cro. Car. 179.
[d] Stat. 12 Car. II. c. 24.

(20) See also 6 Geo. 4, c. 74; 11 Geo. 4, and 1 Wm. 4, c. 60; 4 & 5 Wm. 4, c. 23; 1 & 2 Vict. c. 69.

(21) But the concurrence of the guardian seems necessary; see Cro. Jac. 99; Harg. Co. Lit. 89, a. n. 71.

(22) Vide supra, p. 426, n. 6; 3 B. & C. 485; 5 T. R. 715.

(23) Not by will, since the 1st of January, 1838; see 7 Wm. 4, and 1 Vict. c. 26, s. 7.

(24) And a lease for years whether reserving rent or not (3 Burr. 1794), or any other deed or contract which apparently is beneficial to the infant at the time (2 T. R. 161) binds the infant while under age, but no longer unless it be ratified in writing by some act of the infant after majority; see 9 Geo. 4, c. 3, s. 5; 11 A. & E. 934; but a bond with a penalty or a deed which works a forfeiture, being clearly to his detriment, never binds the infant and is incapable of confirmation; see 3 Burr. 1808; 2 M. & S. 477; 8 E. 330.

make no other contract that will bind him: yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries [25]; and likewise for his good teaching and instruction, whereby he may profit himself afterwards [c]. And thus much, at present, for the privileges and disabilities of infants.

[c] Co. Litt. 172.

There are other acts of an infant, which have no obligatory effect whatever on an infant until ratified by him after majority, thus an account stated (1 T. R. 40; 11 M. & W. 256), a bill of exchange, (2 B. & C. 824), &c.

(25) Numerous cases have arisen in our courts of law with respect to what are necessaries, the general result of which seems to be that necessaries are such articles as a jury think so, considering the age of the infant and his real (not ostensible) station in society at the time of the contract, and also the quality and quantity of the goods supplied under the contract. Thus a gold watch, chain, and breast-pin, under 8*l.* in value, were held necessaries for the son of a gentleman of fortune, though rings were not, being only for ornament (6 M. & W. 42); hire of lodgings are necessaries (1 Scott, 458); money advanced to procure his discharge from arrest (5 Esp. 28; 13 E. 60); or for his education (1 Sid. 112), &c.

But money advanced as a premium of apprenticeship (Peake, Ad. c. 52); goods supplied to trade with (Str. 1083; Cro. Jac. 494; 2 Esp. 480); a racing-jacket (6 Car. & P. 698); the hire of horses, gigs, &c. (7 Car. & P. 52; 1 Man. & Gr. 550), unless for the health of the infant, (1 Jur. 623; Str. 1101), &c., are not necessaries. As to all other contracts entered into by an infant for other than necessaries, the rule seems to be that no action can be brought against either the infant or his representatives, either during his minority or afterwards, unless the infant has confirmed the contract after his minority ceased.

CHAPTER XVIII.

OF CORPORATIONS.

WE have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

Corporations; their purposes and advantages.

These artificial persons are called bodies politic, bodies corporate (*corpora corporata*), or corporations; of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To shew the advantages of these incorporations, let us consider the case of a college in either of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this was a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so: but they could [468] neither frame, nor receive any laws or rules of their conduct; none at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immuni-

ties: for if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them? And, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally unconnected as themselves? So also with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person they have one will, which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws; the privileges and immunities, the estates and possessions of the corporation, when once vested in them, will be for ever vested without any new conveyance, to new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

Origin of corporations.

The honour of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa; who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law [a], in which they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together; they were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corpora-

[469]

[a] Ff. l. 3, t. 4, per tot.

tions are derived[1]. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation; particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion; their maxim being, that "*tres faciunt collegium*[b]." Though they held, that if a corporation originally consisting of three persons, be reduced to one, "*si universitas ad unum redit*," it may still subsist as a corporation "*et stet nomem universitatis*[c]."

Before we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them; and then we shall be better enabled to apprehend their respective qualities.

Several sorts of corporations,—Aggregate,

The first division of corporation is into *aggregate* and *sole*. Corporations *aggregate* consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever; of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church.

Sole,

Corporations *sole* consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation[d]; so is a bishop; so are some deans, and prebendaries, distinct from their several chapters; and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the

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case of a parson of a church. At the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage-house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor,

[b] Ff. 50, 16, 8. [c] Ff. 3, 4, 7. [d] Co. Litt. 43.

(1) The municipal bodies of the continent appear to M. Guizot, to have exercised an influence nearly equal to that of the church on the progress of European civilization (Hist. de Civiliz. Lect. vii). With respect to the early history of the boroughs and municipal corporations of the United Kingdom, complete and accurate information, compiled from the original records and charters, will be found in the invaluable work of Serjeants Merewether and Stephens.

as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and incumbrances; or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law therefore has wisely ordained, that the parson, *quatenus* parson shall never die, any more than the king: by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also[2].

Another division of incorporations, either sole or aggregate, is into *ecclesiastical* and *lay*. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons[3]; such as bishops; certain deans, and prebendaries; all archdeacons, parsons, and vicars; which are sole corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. These are erected for the furtherance of religion, and perpetuating the rights of the church. Lay corporations are of two sorts, *civil* and *eleemosynary*. The civil are such as are erected for a variety of temporal purposes. The king, for instance, is made a corporation to prevent in general the possibility of an *interregnum*, or vacancy of the throne, and to preserve the possessions of the crown entire; for immediately upon the demise of one king, his successor is, as we

Ecclesiastical,

Lay which are civil,

(2) But in order to preserve entire the original rights of a parsonage or other corporation as against the acts of the corporation itself, the Legislature has found it necessary to restrain their exercise of the right of alienation by various statutory enactments. Thus ecclesiastical corporations were restrained by the disabling statutes of the reigns of Elizabeth and George 3, as to which, vide infra, vol. ii. p. 320; and municipal corporations, by the recent statute for the reform of those corporations, 6 & 7 Wm. 4, c. 76, vide infra, p. 475, n. 12.

(3) It is not their being composed of spiritual persons, but their having been founded for spiritual purposes, which makes such corporations ecclesiastical; vide infra, p. 483, and Kyd on Corp. p. 23.

have formerly seen, in full possession of the regal rights and dignity. Other lay corporations are erected for the good
[471] government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, or the like; some for the advancement and regulation of manufactures and commerce; as the trading companies[4] of London, and other towns: and some for the better carrying on of divers special purposes; as churchwardens, for conservation of the goods of the parish[5]; the college of physicians and company of surgeons in London, for the improvement of the medical science; the royal society for the advancement of natural knowledge; and the society of antiquaries for promoting the study of antiquities. And among these I am inclined to think the general corporate bodies of the universities of Oxford and Cambridge must be ranked: for it is clear they are not spiritual or ecclesiastical corporations, being composed of more laymen than clergy: neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries; for these are rewards *pro opera et labore*, not charitable donations only, since every stipend is preceded by service and duty; they seem therefore to be merely civil corporations[6]. The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent: and all colleges, both *in* our universities, and *out*[e] of them: which colleges, are founded

Lay which are eleemosynary.

[e] Such as at Manchester, Eton, Winchester, &c.

(4) As to the distinction (which seems very slight) between a corporation and an incorporated trading company, *i. e.* an association or fraternity, established by charter mediately or immediately, between persons exercising a certain trade or mystery within a certain locality; see the cases cited, Kyd. 46—49.

(5) Vide supra, p. 394. Churchwardens are incorporated at common law only so far as regards the goods of the parish, for injuries to which they can maintain an action at law (Keil. 32); but they had no capacity to hold lands for any purpose whatever until the statute 59 Geo. 3, c. 12. They may also maintain a suit in equity to restrain by injunction an injury to the fabric of the church; see 9 Sim. 279.

(6) "Whatever may have been the notion in former times," said Lord Mansfield, (3 Burr. 1656), "it is most certain now, that the corporations of universities are lay corporations."

for two purposes; 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons[f], and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies.

Having thus marshalled the several species of corporations, let us next proceed to consider, 1. How corporations in general may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are visited. And, 4. How they may be dissolved. [472]

I. Corporations, by the civil law, seem to have been created by the mere act, and voluntary association of their members: provided such convention was not contrary to law, for then it was *illicitum collegium*[g]. It does not appear that the prince's consent was necessary to be actually given to the foundation of them; but merely that the original founders of these voluntary and friendly societies[7] (for they were little more than such) should not establish any meetings in opposition to the laws of the state. I. How created.

But, with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given[h]. The king's implied consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence; common law being nothing else but By king's consent.

[f] 1 Lord Raym. 6.

[g] Ff. 47, 22, 1. *Neque societas, neque collegium, neque hujusmodi corpus passim omnibus habere conceditur; nam et legibus, et senatus consultis, et principalibus constitutionibus ea res coercetur.* Ff. 3, 4, 1.

[h] Cities and towns were first erected into corporate communities on the continent, and endowed with many valuable privileges, about the eleventh century: (Roberts. Cha. V. i. 30), to which the consent of the feodal sovereign was absolutely necessary, as many of his prerogatives and revenues were thereby considerably diminished.

(7) The inns of court seem to be voluntary associations of this class, vide supra, p. 23, n. 7. As to "friendly societies," here incidentally mentioned by Blackstone, their rules, powers, &c.; see 10 Geo. 4, c. 56, amended by 4 & 5 Wm. 4, c. 40; and 11 Geo. 4 & 1 Wm. 4, c. 60, s. 211.

custom, arising from the universal agreement of the whole community. Of this sort are the king himself, all bishops, parsons, vicars, churchwardens, and some others; who by common law have ever been held (as far as our books can shew us) to have been corporations, *virtute officii*: and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation, capable to transmit his rights to his successors, at the same time.

[473] Another method of implication, whereby the king's consent is presumed, is as to all corporations by *prescription*, such as the city of London, and many others[i], which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created. For though the members thereof can shew no legal charter of incorporation, yet in cases of such high antiquity, the law presumes there once was one; and that by the variety of accidents which a length of time may produce, the charter is lost or destroyed. The methods by which the king's consent is expressly given, are either by act of parliament or charter. By act of parliament[8], of which the royal assent is a necessary ingredient, corporations may undoubtedly be created[j]; but it is observable, that (till of late years) most of those statutes, which are usually cited as having created corporations, do either confirm such as have been before created by the king; as in the case of the college of physicians erected by charter 10 Henry VIII.[k], which charter was afterwards confirmed in parliament[l]; or, they permit the king to erect a corporation *in futuro* with such and such powers: as is the case of the bank of England[m], and the society of the British fishery[n]. So that the imme-

By act of parliament.

[i] 2 Inst. 330.
[j] 10 Rep. 29; 1 Roll. Abr. 512.
[k] 8 Rep. 114.
[l] 14 & 15 Hen. VIII. c. 5.
[m] Stat. 5 & 6 W. & M. c. 20.
[n] Stat. 23 Geo. II. c. 24.

(8) And inasmuch as the transcendent power of parliament alone can confer powers and privileges in derogation of the existing laws, such companies as are desirous of possessing such powers or privileges must be incorporated for such purposes by act of parliament. For example, the East India Company formally possesses an exclusive right of trading, railway companies requiring a power of compelling the sale of lands, trading companies requiring a limitation to the personal liability of their members, &c. But as to these last, vide next note.

diate creative act was usually performed by the king alone, in virtue of his royal prerogative [o].

All the other methods, therefore, whereby corporations exist, by common law, by prescription, and by act of parliament, are for the most part reducible to this of the king's letters patent, or charter of incorporation. The king's creation may be performed by the words "*creamus, erigimus, fundamus, incorporamus,*" or the like. Nay, it is held, that if the king grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly [p], this is alone sufficient to incorporate and establish them for ever [q] [9]. By patent or charter.

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The parliament, we observed, by its absolute and transcendent authority, may perform this or any other act whatsoever: and actually did perform it to a great extent, by statute 39 Eliz. c. 5, which incorporated all hospitals and houses of correction founded by charitable persons, without farther trouble, and the same has been done in other cases of charitable foundations. But otherwise it has not formerly been usual thus to intrench upon the prerogative of the crown, and the king may prevent it when he pleases [10]. And, in the particular Parliament may incorporate,

[o] See page 272.

[p] *Gild* signified among the Saxons a fraternity, derived from the verb ᵹilδan to pay, because every man paid his share towards the expenses of the community. And hence their place of meeting is frequently called the *Gild* or *Guild hall.*

[q] 10 Rep. 30; 1 Roll. Abr. 513.

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(9) By 7 Wm. 4, and 1 Vict. c. 73, (repealing 8 Geo. 4, c. 79 in part, and 4 & 5 Wm. 4, c. 94, wholly), the crown is enabled (sect. 1) by letters patent to grant to any company associated together for trading or other purposes, any privileges which, according to the rules of common law, it would be competent to her Majesty to grant by any charter of incorporation; such companies to sue and be sued in the name of one of two officers appointed by the company (sect. 3), and registered in Chancery (sect. 16); it being also competent to the crown to limit the individual liability of the members of such companies (sect. 4); and various other powers may be conferred on such companies which could not have been inserted in a royal charter at common law. But such companies must make certain returns as to shares, change of officers, transfers, and other matters mentioned in the act.

(10) That is, he may prevent the passing of such act by refusing his assent thereto. The right of the crown to this veto has been already noticed, supra, p. 184, n. 84. "The constitutional notion of an English king," says Mr. J. Coleridge, in his admirable note to this passage, "includes, yet keeps distinct, two characters, one as head of the executive, the other, as an independent member of the Legislature. As the head of the executive,

instance before mentioned, it was done, as sir Edward Coke observes [r], to avoid the charges of incorporation and licenses of mortmain in small benefactions; which in his days were grown so great, that they discouraged many men from undertaking these pious and charitable works.

or the king may delegate the power.

The king (it is said) may grant to a subject the power of erecting corporations [s], though the contrary was formerly held [t]; that is, he may permit the subject to name the persons and powers of the corporations at his pleasure; but it is really the king that erects, and the subject is but the instrument: for, though none but the king can make a corporation, yet *qui facit per alium facit per se* [u]. In this manner the chancellor of the university of Oxford has power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students [11].

A name is essential to a corporation.

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When a corporation is erected, a *name* must be given to it; and by that name alone it must sue and be sued, and do all legal acts; though a very minute variation therein is not material [v]. Such name is the very being of its constitution; and though it is the will of the king that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions [w]. The

[r] 2 Inst. 722.

[s] Bro. Abr. tit. Prerog. 53; Viner. Prerog. 88, pl. 16.

[t] Year-book, 2 Hen. VII. 13.

[u] 10 Rep. 33.

[v] Ibid. 122.

[w] Gilb. Hist. C. P. 182.

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he is the minister of the supreme power, and can neither dispense with the laws nor refuse to obey them;—as a member of the Legislature, he is as free, absolute, and irresponsible, as either of the other two estates; in the former capacity, his ministers are subordinate servants, and take upon themselves that personal responsibility for his acts, or omissions, which, by reason of the sacredness of his person, cannot attach on himself; in the latter, he has and can have no responsible ministers, for the irresponsibility of his acts is absolute and attaches to the character in which they are done (that of a member of the supreme power), and not to his person." (Coleridge's Blackst. *in loco*).

(11) So also the corporation of the city of London possesses by charter the power of establishing companies, fraternities, and guilds; which, however, are subject to the general control of the civic authorities. Other corporations may also establish such fraternities, if empowered so to do by their charter; see Kyd on Corp. pp. 46—49. As to the origin, and nature of London companies, see Pulling on the laws, customs, &c. of the Port and City of London, pp. 15, 71, &c.

name of incorporation, says sir Edward Coke, is as a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name the king baptizes the incorporation [x].

Capacities and incapacities of corporations.

II. After a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider [12]. Some of these are necessarily and

[x] 10 Rep. 28.

(12) All the municipal corporations of the United Kingdom were undoubtedly instituted for the advancement and regulation of trade, the local administration of justice, and the better government of their particular vicinities. About the reign of Elizabeth, however, the municipal and parliamentary franchises became in most cases united; (see Hallam. Con. His. iii. 52—53), and the great case of corporations (10 Rep.) having, about the same time, vested the right of making bye-laws in the "select bodies" of corporations, we find these institutions completely perverted from their original intention. In short from this period the right of making bye-laws, no less than another necessary corporate right, viz., the right of electing corporate members in the room of such as go off, seem to have been so extensively and deeply abused, that at length the "select bodies" did not hesitate to alienate corporate property for electioneering purposes; see 2 & 3 Wm. 4, c. 69. These and other circumstances led to the Municipal Corporations Reform Act, (5 & 6 Wm. 4, c. 76), the object of which statute was to restore them to their original purposes, and as nearly as possible to assimilate their constitutions to each other; for their constitutions, varying of course according to their respective charters, were, before that act, necessarily very dissimilar. By sect. 1, all acts, charters, and customs, inconsistent with the provisions of that act were repealed; by sects. 2, 4, the rights of freemen *in esse* were reserved, but by sect. 3, no freedom could be thenceforth acquired by gift or purchase. By sect. 6, all corporations are assimilated in style. By sect. 9, every occupier of a house or shop within any borough, being also resident within seven miles of such borough, and rated in respect of such premises to the relief of the poor, is entitled to be on the burgess lists, which lists are to be annually made out by the overseers and revised by the mayor and assessors; which latter officers are chosen by the burgesses (sect. 38). By sects. 29, 30, 43, the burgesses, upon the 1st of November in every year, shall elect from the persons qualified to be councillors, (as to which, see sect. 28), the councillors of such borough, or such part of them as shall be needed to supply the places of those who shall go out of office, under sect. 31; which provides that one-third part of the council shall go out of office annually. The aldermen, (whose number is one-third that of the councillors), are to be elected on the 9th of November in every year by the councillors out of their own body or out of the persons qualified to be councillors, and one-half of such aldermen are to go out of office annually (sect. 25). The mayor is also to be annually elected from and by the councillors (sect. 49). The mayor, aldermen, and councillors, forming "the council of the borough" (sect. 25), appoint a town-clerk, treasurer, and

inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed of course [y]. As, 1. To have perpetual *succession*. This is the very end of its incorporation: for there cannot be a succession for ever without an incorporation [z]; and therefore all aggregate corporations have a power necessarily implied of *electing* members in the room of such as go off [a]. 2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors; which two are consequential to the former [13]. 4. To have a common seal. For a corporation being an invisible body, cannot manifest its intention by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole [b]. 5. To make by-laws or private statutes for the better govern-

(1.) To have perpetual succession.

(2.) To sue and be sued.

(3.) To purchase lands.

(4.) To have a common seal.

(5.) To make bye-laws.

[y] 10 Rep. 30; Hob. 211.
[z] 10 Rep. 26.
[a] 1 Roll. Abr. 514.
[b] Dav. 44, 48.

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other officers (sect. 58), in certain cases a sheriff and a coroner (sects. 61, 62), committees (sect. 70), and may make bye-laws (sect. 90). If the other corporate property be insufficient to meet the corporate expenses, the council may make and levy a borough-rate, (sect. 92), and they may grant leases of, and otherwise deal with, the corporate property, but subject to the restraints imposed by the act (sects. 94, 95, 96). The accounts are to be audited by a person elected by the burgesses (sect. 38). For the better administration of justice, the crown may appoint justices of the peace (sect. 98), salaried police magistrates (sect. 99), grant a separate court of quarter sessions, and appoint a recorder (sect. 103); see also sect. 118, as to extending the jurisdiction of existing borough courts of record, and the act makes numerous other provisions for reforming these corporations. By sect. 141, the crown is also empowered to grant charters of incorporation, containing the like powers and provisions, upon the petition of the inhabitant householders of any town or borough. The mode of conducting elections under this act has been subsequently amended by 7 Wm. 4, and 1 Vict. c. 78; the sale of church patronage facilitated by 1 & 2 Vict. c. 31; and the act otherwise explained and amended by 4 & 5 Vict. c. 48; 5 & 6 Vict. c. 104, and 6 & 7 Vict. c. 89.

(13) But unless such corporation have a license from the king, enabling them to take and hold lands in mortmain, lands given to a corporation devolve to the crown; see Co. Litt. 2; 7 & 8 Wm. 3, c. 37, infra, p. 479; see also next note.

ment of the corporation; which are binding upon themselves unless contrary to the laws of the land, and then they are void. This is also included by law in the very act of incorporation [c]: for as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic. And this right of making by-laws for their own government, not contrary to the law of the land, was allowed by the law of the twelve tables at Rome [d]. But no trading company is, with us, allowed to make by-laws which may affect the king's prerogative, or the common profit of the people, under penalty of 40*l.* unless they be approved by the chancellor, treasurer, and chief justices, or the judges of assize in their circuits; and, even though they be so approved, still, if contrary to law, they are void [e]. These five powers are inseparably incident to every corporation, at least to every corporation *aggregate:* for two of them, though they may be practised, yet are very unnecessary to a corporation *sole;* viz. to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

Incidents peculiar to aggregate corporations.

There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole: the reason of them ceasing, and of course the law. It must always appear by attorney; for it cannot appear in person, being, as sir Edward Coke says [f], invisible, and existing only in intendment and consideration of law. It can neither maintain, nor be made defendant to, an action of battery or such like personal injuries; for a corporation can neither beat nor be beaten, in its body politic [g]. A corporation cannot commit treason or felony, or other crime, in its corporate capacity [h]; though its members may, in their distinct individual capacities [i]. Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to [477] corporal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due

[c] Hob. 211.

[d] *Sodales legem quam volent, dum ne quid ex publica lege corrumpant, sibi ferunto.*

[e] Stat. 19 Hen. VII. c. 7; 11 Rep. 54.

[f] 10 Rep. 32.

[g] Bro. Abr. tit. Corporation, 63.

[h] 10 Rep. 32.

[i] The civil law also ordains that, for the misbehaviour of a body corporate, the directors only shall be answerable in their personal capacities. Ff. 4, 3, 15.

execution of the office. It cannot be seised of lands to the use of another[j]; for such kind of confidence is foreign to the end of its institution[14]. Neither can it be committed to prison[k]: for its existence being ideal, no man can apprehend or arrest it. And therefore also it cannot be outlawed: for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do; for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods[l]. Neither can a corporation be excommunicated: for it has no soul, as is gravely observed by sir Edward Coke[m]: and therefore also it is not liable to be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salute animæ*, and their sentences can only be enforced by spiritual censures: a consideration which, carried to its full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.

Other incidents of some corporations.

There are also other incidents and powers, which belong to some sort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot[n 15]; for such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid. In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules, laws, statutes, and ordinances, which they are bound to observe: but corporations merely

[j] Bro. Abr. tit. Feoffm. al. uses, 40; Bacon on uses, 347.

[k] Plowd. 558.

[l] Bro. Abr. tit. Corporation, 11; Outlawry, 72.

[m] 10 Rep. 32.

[n] Co. Litt. 46.

(14) But a devise to a corporation, though void at law, may be good as a trust in equity; see the cases considered by the Lord Chancellor of Ireland in his luminous judgment in the case of the *Incorporated Society* v. *Richards*, 1 Dr. & War. 293.—333. A corporation may also be a trustee for charitable or any other purposes, for "actual confidence in the person" is not necessary to support the trust; see 55 Geo. 3, c. 147; 56 Geo. 3, c. 52, and 1 & 2 Geo. 4, c. 92, by which statutes corporations and other trustees, holding lands in trust for charitable purposes, are empowered, under the direction of the commissioners appointed as in such acts directed, to exchange such lands for others of greater value or more conveniently situated.

(15) Vide infra, vol. ii. pp. 430, 433.

lay, constituted for civil purposes, are subject to no particular statutes; but to the common law, and to their own by-laws, not contrary to the laws of the realm [o]. Aggregate corporations also, that have by their constitution a head, as a dean, warden, master, or the like, cannot do any acts during the vacancy of the headship, except only appointing another: neither are they then capable of receiving a grant; for such corporation is incomplete without a head [p]. But there may be a corporation aggregate constituted without a head [q]; as the collegiate church of Southwell in Nottinghamshire, which consists only of prebendaries; and the governors of the charter-house, London, who have no president or superior, but are all of equal authority. In aggregate corporations also, the act of the major part is esteemed the act of the whole [r]. By the civil law this major part must have consisted of two-thirds of the whole; else no act could be performed [s]; which perhaps may be one reason why they required three at least to make a corporation. But, with us, *any* majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act (which king Henry VIII. found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations,) it was therefore enacted by statute 33 Hen. VIII. c. 27, that all private statutes shall be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being in the minority; but this statute extends not to any negative or necessary voice given by the founder to the head of any such society [16].

We before observed that it was incident to every corporation to have a capacity to purchase lands for themselves and successors; and this is regularly true at the common law [t]. [479]

[o] Lord Raym. 8.
[p] Co. Litt. 263, 264.
[q] 10 Rep. 30.
[r] Bro. Abr. tit. Corporation, 31, 34.
[s] Ff. 3, 4, 3.
[t] 10 Rep. 30.

(16) The statutes of Queen's College, Cambridge, direct certain elections to be made *per præsidentem et majorem partem sociorum*. Lord Eldon, after reviewing all the authorities on the subject, held that these words gave the president a negative voice in all such elections; see 5 Russ. 64.

But they are excepted out of the statute of wills[u]: so that no devise of lands to a corporation by will is good: except for charitable uses, by statute 43 Eliz. c. 4[w]: which exception is again greatly narrowed by the statute 9 Geo. II. c. 36. And also, by a great variety of statutes[x], their privilege even of purchasing from any living grantor is much abridged; so that now a corporation, either ecclesiastical or lay, must have a licence from the king to purchase[y], before they can exert that capacity which is vested in them by the common law; nor is even this in all cases sufficient. These statutes are generally called the statutes of *mortmain:* all purchases made by corporate bodies being said to be purchases in *mortmain, in mortua manu:* for the reason of which appellation sir Edward Coke[z] offers many conjectures; but there is one which seems more probable than any that he has given us, viz. that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law, land therefore, holden by them, might with great propriety be said to be held *in mortua manu.*

Statutes of charitable uses.

Statutes of mortmain.

I shall defer the more particular exposition of these statutes of mortmain till the next book of these Commentaries, when we shall consider the nature and tenures of estates; and also the exposition of those disabling statutes of queen Elizabeth, which restrain spiritual and eleemosynary corporations from aliening such lands as they are at present in legal possession of; only mentioning them in this place, for the sake of regularity, as statutable incapacities incident and relative to corporations.

Duties of bodies politic.

The general *duties* of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one; that of acting up to the end or design, whatever it be, for which they were created by their founder[17].

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[u] 34 Hen. VIII. c. 5.

[w] Hob. 136.

[x] From *magna carta*, 9 Hen. III. c. 36, to 9 Geo. II. c. 36.

[y] By the civil law a corporation was incapable of taking lands, unless by special privilege from the emperor; *collegium, si nullo speciali privilegio subnixum sit, hæreditatem capere non posse, dubium non est.* Cod. 6, 24, 8.

[z] 1 Inst. 2.

(17) It may be here incidentally mentioned that in the administration of property left upon trust for charitable purposes, whether to a corporation or

III. How corporations may be visited.

III. I proceed therefore next to inquire, how these corporations may be *visited*. For corporations, being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. With regard to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the king, as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all parsons and vicars, and all other spiritual corporations. With respect to all lay corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary; for in a lay incorporation the ordinary neither can nor ought to visit[a].

Visitors of ecclesiastical corporations,—king, archbishop, or bishop.

Of lay corporations,—the founder, his heirs or assigns.

I know it is generally said, that civil corporations are subject to no visitation, but merely to the common law of the land; and this shall be presently explained. But first, as I have laid it down as a rule that the founder, his heirs or assigns, are the visitors of all lay corporations, let us inquire what is meant by the *founder*. The founder of all corporations in the strictest and original sense is the king alone, for he only can incorporate a society: and in civil incorporations, such

[a] 10 Rep. 31.

to trustees, the rule that the donor's intention shall guide the trustees in their administration of the trust funds, becomes much modified by the *cy-près* doctrine, which by a long series of decisions has now become fully established in courts of equity. Under this doctrine the Court of Chancery will, on failure of the express object of the donor's charitable intentions, direct a reference to inquire what objects are (*cy-près*) nearest to such express objects, and after mature consideration will direct the application of the trust funds to such objects. As to the principles which govern the courts in the application of this doctrine, see *Cherry* v. *Mott*, 1 My. & Cr. 123, and *Attorney-General* v. *Ironmongers' Company*, 2 Beav. 313, and Cr. & Ph. 208. By a recent statute for improving the condition and extending the benefits of grammar schools (3 & 4 Vict. c. 77), the Court of Chancery has been empowered to a certain extent to alter the original design of such foundations, paying due regard, however, to the intentions of their founders and benefactors.

as mayor and commonalty, &c. where there are no possessions or endowments given to the body, there is no other founder but the king: but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes, and makes two species of foundation; the
[481] one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder: and it is in this last sense that we generally call a man the founder of a college or hospital [b]. But here the king has his prerogative: for if the king and a private man may join in endowing an eleemosynary foundation, the king alone shall be the founder of it. And, in general, the king being the sole founder of all civil corporations and the endower the perficient founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the king; and of the latter to the patron or endower.

The king, being the fundator incipiens of all civil corporations,

The king being thus constituted by the law visitor of all civil corporations, the law has also appointed the place wherein he shall exercise this jurisdiction, which is the court of king's bench: where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and all their controversies decided [18]. And this is what I understand to be the meaning of our lawyers, when they say that these civil corporations are liable to no visitation; that is, that the law having by immemorial usage appointed them to be visited and

visits by the Court of King's Bench.

[b] 10 Rep. 33.

(18) This only applies to strict visitatorial superintendence over the misbehaviour of the members of a civil corporation in their pure corporate capacity; for where a corporation is guilty of maladministration of trust property the proper place for its remedy is the Court of Chancery. In civil corporations the king is visitor through the Court of King's Bench; for corporate bodies, which respect the regulation of trade, the public police, and the administration of justice, are necessarily better regulated under the superintendence of a court of law; but, as regards eleemosynary corporations, the king's visitatorial power has been committed to the lord chancellor, as in matters of charity the more appropriate supervisor. (*King* v. *St. Catherine's Hall*, 4 T. R. 233, 244; *ex parte Wrangham*, 2 Ves. 619). The mode of application to the lord chancellor in these cases is not by way of information, but by petition to the Queen in her high Court of Chancery as visitor of such corporations; see the cases cited in Lewin on Trustees, p. 388.

inspected by the king their founder, in his majesty's court of king's bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority [c]. And this is so strictly true, that though the king by his letters patent had subjected the college of physicians to the visitation of four very respectable persons, the lord chancellor, the two chief justices, and the chief baron; though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for near a century: yet in 1753, the authority of this provision coming in dispute, on an appeal [482] preferred to these supposed visitors, they directed the legality of their own appointment to be argued: and, as this college was merely a civil and not an eleemosynary foundation, they at length determined, upon several days' solemn debate, that they had no jurisdiction as visitors; and remitted the appellant (if aggrieved) to his regular remedy in his majesty's court of king's bench.

Eleemosynary corporations are visited by the fundator perficiens, his heirs, or successors.

As to eleemosynary corporations, by the dotation the founder and his heirs are of common right the legal visitors, to see that such property is rightly employed, as might otherwise have descended to the visitor himself: but, if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed is invested with all the founder's power in exclusion of his heir. Eleemosynary corporations are chiefly hospitals, or colleges in the universities. These were all of them considered by the popish clergy as of mere ecclesiastical jurisdiction: however, the law of the land judged otherwise; and with regard to hospitals it has long been held [d], that if the hospital be spiritual, the bishop shall visit; but if lay, the patron. This right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1, which ordained, that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by statute 14 Eliz. c. 5, which directs the

[c] This notion is perhaps too refined. The court of king's bench (it may be said), from its general superintendent authority where other jurisdictions are deficient, has power to regulate all corporations where no special visitor is appointed. But not in the light of visitor: for as its judgments are liable to be reversed by writs of error, it may be thought to want one of the essential marks of visitatorial power.

[d] Year-book, 8 Edw. III. 28; 8 Ass. 29.

bishops to visit such hospitals only, where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit [e].

Colleges in the universities (whatever the common law may now, or might formerly judge) were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or at least as *clerical*, corporations; and therefore the right of visitation was claimed by the ordinary of the
[483] diocese. This is evident, because in many of our most ancient colleges, where the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bull to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of our colleges, where no special visitor is appointed, the bishop of that diocese, in which Oxford was formerly comprised, has immemorially exercised visitatorial authority: which can be ascribed to nothing else, but his supposed title as ordinary to visit this, among other ecclesiastical foundations. And it is not impossible, that the number of colleges in Cambridge, which are visited by the bishop of Ely, may in part be derived from the same original.

Power of visitors.

But, whatever might be formerly the opinion of the clergy, it is now held as established common law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons; and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law [f]. And yet the power and jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till the famous case of *Philips and Bury* [g]. In this the main question was, whether the sentence of the bishop of Exeter, who (as visitor) had deprived doctor Bury the rector of Exeter college, could be examined and redressed by the court of

[e] 2 Inst. 725.

[f] Lord Raym. 8.

[g] Lord Raym. 5; 4 Mod. 106; Show. 35; Skinn. 407; Salk. 403; Carthew, 180. [In 2 T. R. 346, is a report of Lord Holt's judgment in this celebrated case, printed from his own MSS.]

king's bench. And the three puisnè judges were of opinion, that it might be reviewed, for that the visitor's jurisdiction could not exclude the common law; and accordingly judgment was given in that court. But the lord chief justice Holt was of a contrary opinion; and held, that by the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course: and that from him, and him only, the party aggrieved ought to have redress; the founder having reposed in him so entire a confidence, [484] that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever. And, upon this, a writ of error being brought into the house of lords, they concurred in sir John Holt's opinion, and reversed the judgment of the court of king's bench. To which leading case all subsequent determinations have been conformable[19]. But, where the visitor is under a temporary disability, there the court of king's bench will interpose, to prevent a defect of justice [h]. Also it is said [i], that if a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise, where he mistakes in a thing within his power.

IV. We come now, in the last place, to consider how corporations may be dissolved. Any particular member may be disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land; or he may resign it by his own voluntary act [k]. But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the person or

IV. How corporations are dissolved.

[h] Stra. 797. [k] 11 Rep 98. [i] 2 Lutw. 1566.

(19) In the *King* v. *The Master and Fellows of St. Katherine's Hall, Cambridge*, 4 T. R. 233, it was decided that, if no special visitor of a private eleemosynary lay foundation has been appointed by the founder, the right of visitation in default of his heirs devolves upon the crown, and that the Court of Queen's Bench will not entertain visitatorial jurisdiction over such foundation or interfere by mandamus in their elections, but such visitatorial jurisdiction must be exercised by the Lord Chancellor alone. See also the cases cited in the matter of *Downing College*, 2 My. & Cr 612.

his heirs, who granted them to the corporation: for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth [l]. The grant is indeed only during the life of the corporation; which *may* endure for ever; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities [m]; agreeable to that maxim of the civil law [n], "*si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent.*"

[485] A corporation may be dissolved, 1. By act of parliament, which is boundless in its operations. 2. By the natural death of all its members, in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the king, which is a kind of suicide. 4. By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law, for the purposes of the state in the reigns of king Charles and king James the Second, particularly by seizing the charter of the city of London, gave great and just offence; though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular: but the judgment against that of London was reserved by act of parliament [o] after the Revolution; and by the same statute it is enacted, that the franchises of the city of London shall never more be forfeited for any cause whatsoever. And, because by the common law corporations were dissolved, in case the mayor or head officer was not duly elected on the day appointed in the charter or established by prescription, it is

[l] Co. Litt. 13.
[m] 1 Lev. 237.
[n] Ff. 3, 4, 7.
[o] Stat. 2 W. & M. c. 8.

now provided[p], that for the future no corporation shall be dissolved upon that account[20]; and ample directions are given for appointing a new officer, in case there be no election, or a void one, made upon the prescriptive or charter day.

[p] Stat. 11 Geo. I. c. 4.

(20) By sect. 25, of 7 Wm. 4, and 1 Vict. c. 78, explaining and amending 5 & 6 Wm. 4, c. 76, it was enacted, that in case there shall be no election of mayor or any of the aldermen, councillors, or other corporate officers, in any borough named in the said act, upon the day or within the time appointed by that act, or in case such election shall afterwards become void, through the default of the presiding officer or by any accident or other means whatsoever, the corporation shall not thereby be deemed to be dissolved or disabled from electing such mayor, alderman, or councillor, or other corporate officer, for the future; but may proceed to their elections in the manner prescribed in the act; which, it may be observed, makes various provisions for remedying other errors and deficiencies in the elections of corporate officers and for otherwise amending the Municipal Corporations Reform Act.

END OF THE FIRST BOOK.

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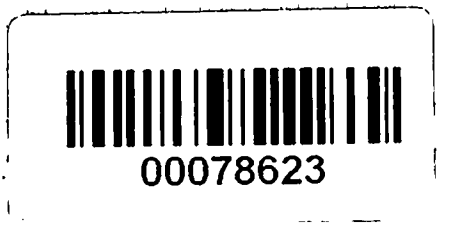
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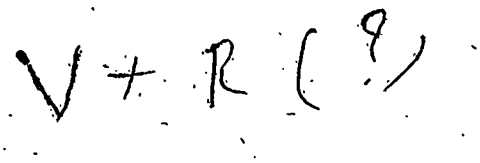

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